

COURT OF CRIMINAL APPEALS NO.

CR-2011-0207

APPEAL TO ALABAMA COURT OF CRIMINAL APPEALS

FROM

CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMACIRCUIT COURT NO CC-2008-3771.60CIRCUIT JUDGE CLYDE E JONESType of Conviction/ Order Appealed From: RULE 32 PETITIONSentence Imposed: PETITION DENIEDDefendant Indigent: ☒ YES ☐ NODURRELL BESTER**NAME OF APPELLANT**JOHN CHARLES ROBBINS (205) 320-5270

(Appellant's Attorney) (Telephone No.)

2031 2ND AVENUE NORTH

(Address)

BIRMINGHAMAL35203

(City)

(State)

(Zip Code)

V.

STATE OF ALABAMA**NAME OF APPELLEE**

(State represented by Attorney General)

NOTE: If municipal appeal, indicate above, and enter

name and address of municipal attorney below.

df

(For Court of Criminal Appeals Use Only)

H

ACRO370 ALABAMA JUDICIAL INFORMATION SYSTEM CASE: CC 2008 003771.60
 PER: ROS CASE ACTION SUMMARY
 AGE: 1 CIRCUIT CRIMINAL RUN DATE: 02/09/2012
 =====
 IN THE CIRCUIT COURT OF JEFFERSON JUDGE: CEJ

STATE OF ALABAMA VS BESTER DURRELL
 #216904 HOLMAN UNIT 3700
 CASE: CC 2008 003771.60
 ATMORE, AL 36503 5099

DOB: [REDACTED] SEX: M RACE: B HT: 6 01 WT: 220 HR: BLK EYES: BRO
 SSN: [REDACTED] ALIAS NAMES: BESTER DURELL
 =====
 CHARGE01: RULE 32-FELONY CODE01: RULE LIT: RULE 32-FELONY TYP: F #: 001
 OFFENSE DATE: AGENCY/OFFICER:

DATE WAR/CAP ISS: DATE ARRESTED:
 DATE INDICTED: DATE FILED: 12/09/2010
 DATE RELEASED: DATE HEARING:
 BOND AMOUNT: \$.00 SURETIES:

DATE 1: DESC: TIME: 0000
 DATE 2: DESC: TIME: 0000

TRACKING NOS: GJ 2008 001997 00 / DC 2008 003379 00 /

DE/ATY: ROBBINS JOHN CHARLES TYPE: R TYPE:
 2031 2ND AVE N

BIRMINGHAM AL 35203 00000

PROSECUTOR: FALLS BRANDON KENT

=====

OTH CSE: GJ200800199700 CHK/TICKET NO: GRAND JURY:
 COURT REPORTER: SID NO: 000259194
 DEF STATUS: PRISON DEMAND: OPER: ROS

TRANS DATE	ACTIONS, JUDGEMENTS, AND NOTES	OFF
12/08/2010	AFTER CONSIDERATION OF SAME, DEFENDANT'S MOTION	LYK
12/08/2010	TO PROCEED IN FORMA PAUPERIS IS HEREBY GRANTED	LYK
12/14/2010	ASSIGNED TO: (CEJ) (AR01)	LYK
12/14/2010	INITIAL STATUS SET TO: "P" - PRISON (AR01)	LYK
12/14/2010	CHARGE 01: RULE 32-FELONY/#CNTS: 001 (AR01)	LYK
12/14/2010	FILED ON: 12/09/2010 (AR01)	LYK
12/14/2010	12/09/2010: PETITION FOR RELIEF FROM CONVICTION OR	LYK
12/14/2010	SENTENCE (PURSUANT TO RULE 32, ALABAMA RULES OF	LYK
12/14/2010	CRIMINAL PROCEDURE)	LYK
12/14/2010	CASE ACTION SUMMARY PRINTED (AR01)	LYK
12/14/2010	COPY OF RULE 32 PETITION PROVIDED TO DISTRICT ATTY	LYK
12/14/2010	FILE SENT TO COURTROOM TO RULE ON PETITION	LYK
12/15/2010	STATE HAS 30 DAYS AND NO LATER THAN 1/17/11 TO	CYC
12/15/2010	RESPOND	CYC
12/16/2010	CASE SCANNED STATUS SET TO: N (AR10)	CYC
12/16/2010	SET FOR: REVIEW DOCKET/HEAR ON 01/29/2011 AT 0900A	CYC
12/17/2010	NOTIFIED ALL PARTIES OF ORDER DATED 12-15-10	TAP

ACRO370 ALABAMA JUDICIAL INFORMATION SYSTEM CASE: CC 2008 003771.60
 OPER: ROS CASE ACTION SUMMARY
 PAGE: 2 CIRCUIT CRIMINAL RUN DATE: 02/09/2012
 =====
 IN THE CIRCUIT COURT OF JEFFERSON JUDGE: CEJ

TATE OF ALABAMA VS BESTER DURRELL
 #216904 HOLMAN UNIT 3700
 CASE: CC 2008 003771.60
 ATMORE, AL 36503 5099

DOB: [REDACTED] SEX: M RACE: E HT: 6 01 WT: 220 HR: BLK EYES: BRO
 SSN: [REDACTED] ALIAS NAMES: BESTER DURELL

TRANS DATE	ACTIONS, JUDGEMENTS, AND NOTES	OPF
01/03/2011	MOTION TO DISMISS RULE 32 PETITION	SAW
01/06/2011	ATTORNEY FOR DEFENDANT: SCOFFIELD DOUGLAS HARRY	CYC
01/06/2011	SET FOR: STATUS CALL ON 01/24/2011 AT 0900A (AR10)	CYC
01/06/2011	RETURN ORDER PRINTED ON: 01/06/2011 (AR08)	CYC
01/24/2011	DOUGLAS SCOFFIELD, ATTY OF RECORD GIVEN A COPY	CMB
01/24/2011	OF RULE 32 PETITION AND MOTION TO DISMISS RULE 32	CMB
01/24/2011	PETITION AS REQUESTED	CMB
01/24/2011	COPY REQUEST SCANNED, AND COPIES DONE	CMB
01/24/2011	SET FOR: EVIDENTIARY ON 02/18/2011 AT 0900A (AR10)	CYC
01/27/2011	ORDER OF HEARING SENT TO DA, DEFT, ATTY	BRW
02/08/2011	ORDER E-FILED - ORDER - ORDER E-FILED - RENDERED &	AJA
02/08/2011	ORDER - TRANSMITTAL	AJA
02/08/2011	SET FOR: EVIDENTIARY ON 03/15/2011 AT 0900A (AR10)	CYC
02/17/2011	NOTICE OF APPEARANCE	SAW
02/18/2011	ATTORNEY FOR DEFENDANT: ROBBINS JOHN CHARLES (AR10)	SAW
04/28/2011	SET FOR: EVIDENTIARY ON 05/18/2011 AT 0900A (AR10)	JUB
05/03/2011	NOTIFIED ALL PARTIES OF ORDER DATED 4-28-11	TAP
06/22/2011	DISPOSITION JUDGE ID CHANGED FROM: TO: CEJ	JUB
06/22/2011	CHARGE 01 DISPOSED BY: PET DENIED ON: 06/21/2011	JUB
06/22/2011	CHARGE 01: RULE 32-FELONY/#CNTS: 001 (AR10)	JUB
06/22/2011	SENTENCE RECORD CREATED FOR CHARGE: 01 (AR10)	JUB
06/24/2011	SET FOR: RULE 32-FELONY ON 06/17/2011 AT 0900A	JUB
06/24/2011	ORDER E-DOCKETED - ORDER - RULE 32 - PRONOUNCED: 6	AJA
07/13/2011	D001-OTHER - NOTICE OF APPEAL FILED.	AJA
07/13/2011	MOTION - TRANSMITTAL	AJA
07/13/2011	WRITTEN NOTICE OF APPEAL E-FILED ON 7/13/11	LAW
07/14/2011	D001-OTHER /DOCKETED	AJA
07/14/2011	ORDER GENERATED FOR OTHER - NOTICE OF APPEAL - REN	AJA
07/14/2011	ORDER - TRANSMITTAL	AJA
07/15/2011	DEFT HAS 14 DAYS TO FILE AFFIDAVIT OF INDIGENCY	JUB
07/28/2011	D001-OTHER - AFFIDAVIT FILED ON 7/27/2011.	AJA

ACRO370 ALABAMA JUDICIAL INFORMATION SYSTEM CASE: CC 2008 003771.60
 OPER: ROS CASE ACTION SUMMARY
 PAGE: 3 CIRCUIT CRIMINAL RUN DATE: 02/09/2012
 =====
 IN THE CIRCUIT COURT OF JEFFERSON JUDGE: CEJ

TATE OF ALABAMA VS BESTER DURELL
 #216904 HOLMAN UNIT 3700
 CASE: CC 2008 003771.60
 ATMORE, AL 36503 5099

DOB: [REDACTED] SEX: M RACE: B HT: 6 01 WT: 220 HR: BLK EYES: BRO
 SSN: [REDACTED] ALIAS NAMES: BESTER DURELL

07/28/2011	ATTORNEY FOR DEFENDANT: PRO SE (AR10)	AJA
08/02/2011	ORDER GENERATED FOR OTHER - AFFIDAVIT - RENDERED &	AJA
08/02/2011	ORDER - TRANSMITTAL	AJA
08/02/2011	E-ORDER DATED 8/2/11 GRANTING DEFT'S REQUEST TO	LAW
08/02/2011	PROCEED IN FORMA PAUPERIS. STATE TO RESPOND	LAW
08/02/2011	TO SAID PETITION W/IN 30 DAYS& NO LATER THAN	LAW
08/02/2011	9/12/11	LAW
11/02/2011	CASE APPEALED ON: 07/13/2011 (AR10)	LAW
11/02/2011	APPEAL "TO" TYPE: "R" (AR10)	LAW
11/02/2011	APPEAL DATE CHANGED FROM: 00/00/0000 (AR11)	LAW
11/02/2011	APPEAL TYPE CHANGED FROM: (AR11)	LAW
11/02/2011	ATTY 1 TYPE CHANGED FROM: (AR11)	LAW
11/02/2011	ATYW TYPE CHANGED FROM: (AR11)	LAW
11/02/2011	PROSECUTOR CHANGED FROM: (AR11)	LAW
11/02/2011	IRA TYPE CHANGED FROM: (AR11)	LAW
11/02/2011	ATTY 1 CHANGED FROM: (AR11)	LAW
11/02/2011	INDTRL TYPE CHANGED FROM: (AR11)	LAW
11/02/2011	WRITTEN NOTICE OF APPEAL MAILED TO THE COURT OF	LAW
11/02/2011	CRIMINAL APPEALS, ATTY GENERAL, DA & DEFTS ATTY	LAW
11/02/2011	COURT REPORTER 1 CHANGED FROM: (AR11)	LAW
11/07/2011	ORDER FROM CT OF CRIMINAL APPEALS RE: CT REPORTER'	ROS
11/07/2011	TIME FOR FILING THE TRANSCRIPT IS EXTENDED FOR	ROS
11/07/2011	28 DAYS FROM DATE OF ORDER	ROS
11/07/2011	IMPORTANT NOTICE FROM CT OF CRIMINAL APPEALS RE:	ROS
11/07/2011	APPELLATE COUNSEL	ROS
11/07/2011	DEFICIENCY NOTICE/REPORTER'S TRANSCRIPT ORDER	ROS
12/13/2011	DOCKETING STATEMENT	ROS
12/13/2011	REPORTER'S TRANSCRIPT ORDER	ROS
12/14/2011	DOCKETING STATEMENT MAILED TO THE CT OF CRIMINAL	ROS
12/14/2011	APPEALS, ATTY GENERAL, DA, CT REPORTER AND	ROS
12/14/2011	DEFT'S ATTY	ROS
01/04/2012	LETTER TO CT REPORTER FROM THE CT OF CRIMINAL	ROS

STATE OF ALABAMA

VS

ATMORE, AL 36503 5099

01/04/2012	APPEALS RE: TRANSCRIPT TO BE COMPLETED BY	ROS
01/04/2012	01/25/12	ROS
02/09/2012	CASE ACTION SUMMARY PRINTED (AR08)	ROS
02/09/2012	CASE ACTION SUMMARY PRINTED (AR08)	ROS

OTH CSE: GJ200800199700 CHK/TICKET NO: GRAND JURY;
COURT REPORTER: SID NO: 000259194
DEF STATUS: PRISON DEMAND: OPER: LYK
DATE ACTIONS, JUDGEMENTS, AND NOTES

This image shows a single sheet of white paper with horizontal blue or grey ruling lines. A vertical margin line is positioned on the left side, creating a narrow column. The paper appears to be from a notebook or a standard sheet of stationery. There are no markings, text, or drawings on the page.

ACRO369 ALABAMA JUDICIAL INFORMATION CENTER
CASE ACTION SUMMARY
CONTINUATION

CASE: CC 2008 003771.60
JUDGE ID: CEJ

STATE OF ALABAMA VS BESTER DURRELL

DATE ACTION, JUDGMENTS, CASE NOTES

JUDGES NOTES AND ORDERS

12-8-10 After consideration of the 1st Motion
to Proceed on Form Petition is hereby
granted.

12/15/10 The Court has this (30) day and no
later (Monday, January 17, 2011). Court
for review on January 27, 2011 at 9:00 a.m.
No days set.

1/4/11 Attorney Doug J. Joffe is hereby appointed to represent
defendant W.R.N. Case set on January
24, 2011 at 9:00 a.m. for a status conference. Notify parties.

SCANNED JAN 13 2011

1/24/11 Case set on February 18, 2011 at 9:00 a.m. for continuing
hearing. Notify parties.

SCANNED JAN 27 2011



IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BIRMINGHAM DIVISION

STATE OF ALABAMA

V.

BESTER DURRELL

)
)
)
)
)

Case No.: CC-2008-003771.60

ORDER

This case is hereby continued to March 15, 2011 at 9am for Evidentiary Hearing.

DONE this 8th day of February, 2011.

/s CLYDE E JONES

CIRCUIT JUDGE



**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BIRMINGHAM DIVISION**

STATE OF ALABAMA

V.

BESTER DURRELL

)
)
)
)
)

Case No.: CC-2008-003771.00

ORDER

This case is continued to Friday, March 25, 2011 at 9am for an Evidentiary Hearing.

DONE this 11th day of March, 2011.

/s/ CLYDE E. JONES

CIRCUIT JUDGE

3/24/2011 9:02 AM
CC-2008-003771-00
CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
ANNIE MARIE ADAMS, CLERK

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BIRMINGHAM DIVISION

STATE OF ALABAMA

V.

BESTER DURRELL

)
)
)
)
)

Case No.: CC-2008-003771.00

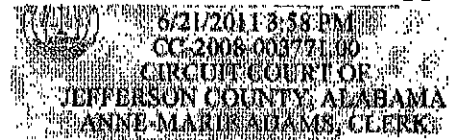
ORDER

This case is hereby continued to Thursday, April 28th, 2011 at 9am for an Evidentiary Hearing.

DONE this 24th day of March, 2011.

/s/ CLYDE E JONES

CIRCUIT JUDGE



**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BIRMINGHAM DIVISION**

STATE OF ALABAMA

V.

BESTER DURRELL
Defendant.

Case No.: CC-2008-003771.00

ORDER

This matter came on to be heard pursuant to the Rule 32 Petition filed by the Defendant on December 9th, 2010.

The first issue regarding the failure to administer the oath to the jury, I find that the record is clear that the Court instructed the jury as to the oath when they appeared here in open court.

Additionally, in Jefferson County, the Court Administrator gives the entire jury pool the Oath of Office when they come in on Monday mornings at 9 a.m.

The Court finds that the second issue regarding failure to request a mistrial regarding the alternate juror making some statements is without merit. There was no harm done, nor was the Defendant prejudiced in any manner, due to the fact that that juror did not actually sit on the jury.

The third issue regarding defense counsel's failure to object to the Court allowing the jurors to ask questions is without merit. That issue has gone up to the Appellate Courts in the State of Alabama on several occasions. And the Appellate Courts have ruled that I do have the authority to allow jurors to ask questions in criminal cases. So that issue is without merit.

The fourth issue involves the Defendant's assertion that trial counsel denied him his right to testify. The Court heard the Defendant's testimony that he requested his attorney Mr. Benson to allow him to testify and they both agreed that there was some discussion about it.

They both agreed that Mr. Benson discussed the fact that if he testified on the witness stand, that the State would cross-examine him as to his four prior felony convictions. Which would basically make him look like a habitual criminal to the jury. And after that discussion, Mr. Benson stated, and I believe him, that the Defendant said that, well, I'm going to take your advice and not testify. So the Court finds that the fourth issue is without merit.

There is another similar issue raised, the fifth issue, in that it is alleged that trial counsel failed to request or object to the Court not giving a jury instruction on the Petitioner's failure to testify. There was no request made to the Court to give the instruction regarding a Defendant who does not testify during his trial and therefore the Court did not have an opportunity to rule on that issue. Therefore, the Court finds

that the fifth issue is without merit also.

The sixth issue is in regard to a claim of ineffective assistance of trial counsel. On the day of trial, as I understand it, the Defendant indicated that he was desirous of hiring other counsel. This Court has never allowed defendants to put off trials on the day of trial, based upon that request alone.

Additionally, there was nothing presented to the Court that was sufficient, in the Court's mind, to continue the case to another date. The Court also felt that said request was simply a dilatory action and designed to simply put off the trial of the case. Accordingly, the sixth issue also has no merit.

The seventh issue relates to the trial Court's denial to the Petitioner's Motion To Suppress. The Court notes that that issue was not raised on appeal, and the Court made the correct decision when it heard said motion. And I think there was probably a pretrial motion to suppress that was made in that case.

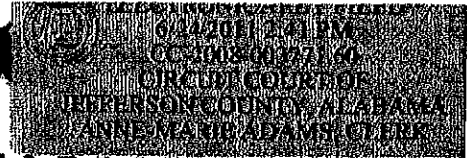
Furthermore the Court has reviewed the facts of this trafficking case and deems that the denial of the motion to suppress was the proper decision in this case, according to that issue, and relief is hereby denied on that ground.

The eighth and last issue relates to the proper sentence for this Defendant. The Court does not believe that, at this late date, it has jurisdiction to amend his sentence of life without parole to life, based upon the time that has passed since the original sentence.

Therefore, it is the judgment of the Court that all of the Petitioner's grounds for relief are hereby denied and the Petitioner is not entitled to relief pursuant to Rule 32 Ala. R. Crim. P.

DONE this 21st day of June, 2011.

/s/ CLYDE E JONES
CIRCUIT JUDGE



ACRO369 ALABAMA JUDICIAL INFORMATION CENTER
CASE ACTION SUMMARY
CONTINUATION

CASE: CC 2008 003771.60
JUDGE ID: CEJ

STATE OF ALABAMA VS BESTER DURRELL

DATE ACTION, JUDGMENTS, CASE NOTES

4/20/11 At defense council's request, case continued to May 18th 2011 at 9:00am for an evidentiary hearing.

SCANNED MAY 09 2011 [Signature] 1428

5/10/11 By agreement of parties, case continued to June 12th 2011 at 9:00am for an evidentiary hearing. Parties notified.

[Signature] 1428

6-13-11 CASE IS CONT to 6-17-11 at 9:00am for Rk 32 Waco. Both parties agree and have been notified.

[Signature] 1428

7/2/2011 1:24 PM
CC-2008-003771-00
CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
ANNE MARIE ADAMS, CLERK

**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BIRMINGHAM DIVISION**

STATE OF ALABAMA

V.

BESTER DURRELL
Defendant.

)
)
)
)
)
)
)

Case No.: CC-2008-003771.00

ORDER

MOTION TO DISMISS filed by STATE OF ALABAMA is hereby GRANTED.

DONE this 2nd day of July, 2011.

/s/ CLYDE E JONES
CIRCUIT JUDGE

7/5/2011 3:47 PM
CC-2008-003771.00
CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
ANNE-MARIE ADAMS, CLERK

**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BIRMINGHAM DIVISION**

STATE OF ALABAMA

V.

BESTER DURRELL
Defendant.

)
)
)
)
)
)

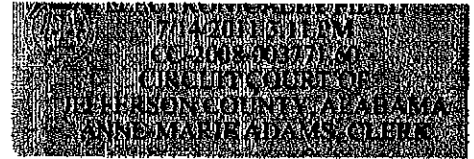
Case No.: CC-2008-003771.00

ORDER

The order dated July 2nd, 2011 is hereby set aside. See order dated June 21st, 2011.

DONE this 5th day of July, 2011.

/s/ CLYDE E JONES
CIRCUIT JUDGE



**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BIRMINGHAM DIVISION**

STATE OF ALABAMA

V.

BESTER DURRELL
Defendant.

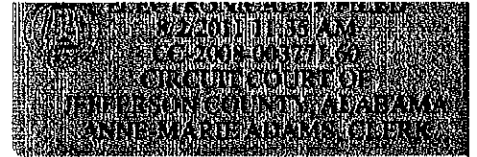
)
) Case No.: CC-2008-003771.60
)
)

ORDER

The Defendant is hereby given fourteen days to file an affidavit of indigency as it relates to his request to proceed in forma pauperis.

DONE this 14th day of July, 2011.

/s/ CLYDE E JONES
CIRCUIT JUDGE



**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BIRMINGHAM DIVISION**

STATE OF ALABAMA

V.

BESTER DURRELL
Defendant.

} Case No.: CC-2008-003771.60
}
}

ORDER

The Defendant's request to proceed in forma pauperis is hereby granted. The State is to respond to said petition within thirty (30) days of today's date and no later than September 1st, 2011. This case is hereby set for review on September 12th, 2011.

DONE this 2nd day of August, 2011.

/s/ CLYDE E JONES
CIRCUIT JUDGE

ACR371

ALABAMA JUDICIAL DATA CENTER
IN THE CIRCUIT COURT OF JEFFERSON COUNTY
NOTICE OF APPEAL TO THE ALABAMA COURT OF CRIMINAL APPEALS
BY THE TRIAL COURT CLERK

JUDGE: CLYDE E JONES

APPEAL DATE: 07/13/2011 | STATE OF ALABAMA VS BESTER DURRELL

INDIGENCY STATUS:

GRANTED INDIGENCY STATUS AT TRIAL COURT:	<input checked="" type="checkbox"/> YES	<input type="checkbox"/> NO
APP. TRIAL COUNSEL PERMITTED TO W/D ON APPEAL:	<input type="checkbox"/> YES	<input checked="" type="checkbox"/> NO
INDIGENT STATUS REVOKED ON APPEAL:	<input type="checkbox"/> YES	<input checked="" type="checkbox"/> NO
INDIGENT STATUS GRANTED ON APPEAL:	<input checked="" type="checkbox"/> YES	<input type="checkbox"/> NO

DEATH PENALTY: NO

APPEAL TYPE: RULE 32 PETITION

THIS APPEAL IS FROM AN ORDER DENYING A PETITION (I.E., RULE 32 PETITION, WRIT OF HABEAS CORPUS, ETC) OR FROM ANY OTHER ISSUED BY THE TRIAL JUDGE.

CO/CASE NUMBER: 01/CC 2008 003771.60

ORDER ENTERED (DATE): 06212011 PETITION: ☐ DISMISSED ☒ DENIED ☐ GRANTED

POST-JUDGMENT MOTIONS FILED: DT FILED DT DENIED CON BY AGREE

<input type="checkbox"/> MOTION FOR NEW TRIAL	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/> MOTION FOR JUDGE OF ACQUIT	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/> MOTION TO W/D GUILTY PLEA	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/> MOTION FOR ATTY TO W/DRAW	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/> OTHER	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

COURT REPORTER(S):

ADDRESS: MARTIN ALICIA
RM 706-JUDGE CLYDE JONES
BIRMINGHAM, AL 35203

APPELLATE COUNSEL #1:

ADDRESS: ROBBINS JOHN CHARLES
2031 2ND AVE N

BIRMINGHAM, AL 35203 3703
205-320-5270
JCROBBINS59@YAHOO.COM

EMAIL ADDRESS:

APPELLATE COUNSEL #2:

ADDRESS:

PHONE NUMBER:

EMAIL ADDRESS:

APPELLANT (PRO SE):

ADDRESS: BESTER DURRELL
#216904 HOLMAN UNIT 3700
ATMORE, AL 36503 5099
000216904

AIS #:

APPELLINE (IF CITY APPEAL):

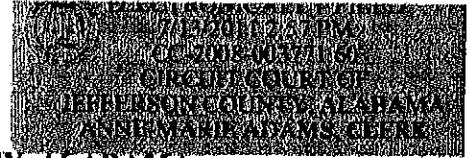
ADDRESS:

I CERTIFY THAT THE INFORMATION PROVIDED
ABOVE IS ACCURATE TO THE BEST OF MY
KNOWLEDGE AND I HAVE SERVED A COPY OF
THIS NOTICE OF APPEAL ON ALL PARTIES TO
THIS ACTION ON THIS

2 DAY OF Nov. 11

OPERATOR: LAW
PREPARED: 11/02/2011

Anna Marie Jones
CIRCUIT COURT CLERK



**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
CRIMINAL DIVISION**

STATE OF ALABAMA,)	
)	
<i>Plaintiff,</i>)	CASE NUMBER:
)	
v.)	CC 2008-3771.6
)	
DURELL BESTER,)	
)	
<i>Defendant.</i>)	

**NOTICE OF APPEAL and LEAVE OF COURT TO PROCEED ON THIS
APPEAL ON AN *IN FORMA PAUPERIS* BASIS**

COMES NOW the Defendant in the above styled proceeding, DURELL BESTER, by and through his undersigned counsel and hereby files this written notice of his intent to appeal the judgement entered by the Court on June 17, 2011 to the Alabama Court of Criminal Appeals. The Defendant hereby requests leave of court to proceed with this appeal on an *in forma pauperis* basis. The Defendant is currently incarcerated serving a life sentence without the possibility of parole and his family is has limited financial resources.

/s/ John C. Robbins
John C. Robbins
Counsel for the Defendant

ROB060

OF COUNSEL:
ROBBINS LAW FIRM
2031 2nd Avenue North
Birmingham, AL 35203
(205) 320-5270
(205) 879-1247 *facsimile*

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing Notice of Appearance upon the following via first class United States Mail, properly addressed and postage thereon prepaid this the 13th day of July, 2011.

Brandon Falls
District Attorney
Criminal Justice Center
801 N. Richard Arrington, Jr. Blvd.
Birmingham, AL 35203

/s/ John C. Robbins
OF COUNSEL

PETITION FOR RELIEF FROM CONVICTION OR SENTENCE

(Pursuant to Rule 32,
Alabama Rules of Criminal Procedure)

FILED IN OFFICE
CIRCUIT CRIMINAL

DEC 09 2010

Case Number

CC	08	3771
CC	08	3773
ID	YR	NUMBER

IN THE Circuit ANNE-MARIE ADAMS Clerk COURT OF JEFFERSON ALABAMA

Durrell Boster vs. State of Alabama
Petitioner (Full Name) Respondent

[Indicate either the "State" or,
if filed in municipal court, the
name of the "Municipality"]

Prison Number 216904 Place of Confinement Holman

County of conviction Jefferson County Circuit Court

NOTICE: BEFORE COMPLETING THIS FORM, READ CAREFULLY
THE ACCOMPANYING INSTRUCTIONS.

- Name and location (city and county) of court which entered the judgment of conviction or sentence under attack JEFFERSON COUNTY
- Date of judgment of conviction May 26, 2009
- Length of sentence LIFE WITHOUT PAROLE
- Nature of offense involved (all counts) TRAFFICKING IN COCAINE
(1 Count) POSSESSION OF DRUG PARAPHERNALIA
(1 Count) AND FAILURE TO PAY TAX
DUED (1 Count)
- What was your plea? (Check one)
 - Gilty _____
 - Not guilty X
 - Not guilty by reason of mental disease or defect _____
 - Not guilty and not guilty by reason of mental disease or defect _____

6. Kind of trial: (Check one)

(a) Jury X (b) Judge only _____

7. Did you testify at the trial?

Yes _____ No X

8. Did you appeal from the judgment of conviction?

Yes X No _____

9. If you did appeal, answer the following:

(a) As to the state court to which you first appealed, give the following information:

(1) Name of court Alabama Court of Criminal Appeals

(2) Result Affirmed

(3) Date of result 4-16-2010

(b) If you appealed to any other court, then as to the second court to which you appealed, give the following information:

(1) Name of court Alabama Supreme Court

(2) Result Affirmed

(3) Date of result _____

(c) If you appealed to any other court, then as to the third court to which you appealed, give the following information:

(1) Name of court D / A

(2) Result _____

(3) Date of result _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

Yes _____

No X

11. If your answer to Question 10 was "yes", then give the following information in regard to the first such petition, application, or motion you filed:

(a) (1) Name of court N/A

(2) Nature of proceeding _____

(3) Grounds raised _____

(attach additional sheets if necessary)

(4) Did you receive an evidentiary hearing on your petition, application, or motion?

Yes _____

No _____

(5) Result _____

(6) Date of result _____

(b) As to any second petition, application, or motion, give the same information:

(1) Name of court N/A

(2) Nature of proceeding _____

(3) Grounds raised _____

(attach additional sheets if necessary)

(4) Did you receive an evidentiary hearing on your petition, application, or motion?

Yes _____

No _____

(5) Result _____

(6) Date of result _____

(c) As to any third petition, application, or motion, give the same information (attach additional sheets giving the same information for any subsequent petitions, applications, or motions):

(1) Name of court N/A

(2) Nature of process _____

(3) Grounds raised _____

(attach additional sheets if necessary)

(4) Did you receive an evidentiary hearing on your petition, application, or motion?

Yes _____ No _____

(5) Result _____

(6) Date of result _____

(d) Did you appeal to any appellate court the result of the action taken on any petition, application, or motion?

(1) First petition, etc. Yes _____ No _____

(2) Second petition, etc. Yes _____ No _____

(2) Third petition, etc. Yes _____ No _____

**ATTACH ADDITIONAL SHEETS GIVING THE SAME INFORMATION
FOR ANY SUBSEQUENT PETITIONS, APPLICATIONS, OR MOTIONS.**

(e) If you did not appeal when you lost on any petition, application, or motion, explain briefly why you did not:

N/A

12. Specify every ground on which you claim that you are being held unlawfully, by placing a check mark on the appropriate line(s) below and providing the required information. Include all facts. If necessary, you may attach pages stating additional grounds and the facts supporting them.

GROUND(S) OF PETITION

Listed below are the possible grounds for relief under Rule 32. Check the ground(s) that apply in your case, and follow the instruction under the ground(s):

XX

- A. The Constitution of the United States or of the State of Alabama requires a new trial, a new sentence proceeding, or other relief.

For your information, the following is a list of the most frequently raised claims of constitutional violation:.

- (1) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
- (2) Conviction obtained by use of coerced confession.
- (3) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (4) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (5) Conviction obtained by a violation of the privilege against self-incrimination.
- (6) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (7) Conviction obtained by a violation of the protection against double jeopardy.
- (8) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
- XX** (9) Denial of effective assistance of counsel.

This list is not a complete listing of all possible constitutional violations.

If you checked this ground of relief, attach a separate sheet of paper with this ground listed at the top of the page. On this separate sheet of paper list each constitutional violation that you claim, whether or not it is one of the nine listed above, and include under it each and every fact you feel supports this claim. Be specific and give details.

B. The court was without jurisdiction to render the judgment or to impose the sentence.

If you checked this ground or relief, attach a separate sheet of paper with this ground listed at the top of the page. On this separate sheet of paper list each and every fact you feel supports this claim. Be specific and give details.

C. The sentence imposed exceeds the maximum authorized by law, or is otherwise not authorized by law.

If you checked this ground or relief, attach a separate sheet of paper with this ground listed at the top of the page. On this separate sheet of paper list each and every fact you feel supports this claim. Be specific and give details.

D. Petitioner is being held in custody after his sentence has expired.

If you checked this ground or relief, attach a separate sheet of paper with this ground listed at the top of the page. On this separate sheet of paper list each and every fact you feel supports this claim. Be specific and give details.

E. Newly discovered material facts exist which require that the conviction or sentence be vacated by the court, because:

The facts relied upon were not known by petitioner or petitioner's counsel at the time of trial or sentencing or in time to file a post-trial motion pursuant to rule 24, or in time to be included in any previous collateral proceeding, and could not have been discovered by any of those times through the exercise of reasonable diligence; and

The facts are not merely cumulative to other facts that were known; and

The facts do not merely amount to impeachment evidence; and

If the facts had been known at the time of trial or sentencing, the result would probably have been different; and

The facts establish that petitioner is innocent of the crime for which he was convicted or should not have received the sentence that he did.

If you checked this ground or relief, attach a separate sheet of paper with this ground listed at the top of the page. On this separate sheet of paper list each and every fact you feel supports this claim. Be specific and give details.

F. The petitioner failed to appeal within the prescribed time and that failure was without fault on petitioner's part.

If you checked this ground or relief, attach a separate sheet of paper with this ground listed at the top of the page. On this separate sheet of paper list each and every fact you feel supports this claim. Be specific and give details.

13. IMPORTANT NOTICE REGARDING ADDITIONAL PETITIONS RULE 32.2(b) LIMITS YOU TO ONLY ONE PETITION IN MOST CIRCUMSTANCES. IT PROVIDES:

"Successive Petitions. The court shall not grant relief on a second or successive petition on the same or similar grounds on behalf of the same petitioner. A second or successive petition on different grounds shall be denied unless the petitioner shows both that good cause exist why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard, and that failure to entertain the petition will result in a miscarriage of justice."

A. Other than an appeal to the Alabama Court of Criminal Appeals or the Alabama Supreme Court, have you filed in state court any petition attacking this conviction or sentence?

Yes _____

No X

B. If you checked "Yes," give the following information as to earlier petition attacking this conviction or sentence:

(a) Name of court _____

(b) Result _____

(c) Date of result _____

(attach additional sheets if necessary)

C. If you checked the "Yes" line in 13A, above, and this petition contains a different ground or grounds of relief from an earlier petition or petitions you filed, attach a separate sheet or sheets labeled: "EXPLANATION FOR NEW GROUND(S) OF RELIEF."

On the separate sheet(s) explain why "good cause exists why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard, and [why the] failure to entertain [this] petition will result in a miscarriage of justice."

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes _____

No X

15. Give the name and address known, of each attorney who represented you at the following stages of the case that resulted in the judgment under attack:

- (a) At preliminary hearing _____
- (b) At arraignment and plea William Benson
413 - B Main St. Trussville, AL 35173
- (c) At trial William Benson
- (d) At sentencing William Benson
- (e) On appeal Martin Weinberg
P.O. Box 154 Shannon, AL 35142
- (f) In any post-conviction proceeding N/A
- (g) On appeal from adverse ruling in a post-conviction proceeding N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes X No _____

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes _____ No X

- (a) If so, give name and location of court which imposed sentence to be served in the future: N/A

- (b) And give date and length of sentence to be served in the future: N/A

- (c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes _____ No X

18. What date is this petition being mailed?

Wherefore, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

PETITIONER'S VERIFICATION UNDER OATH SUBJECT TO PENALTY FOR PERJURY

I swear (or affirm) under penalty of perjury that the foregoing is true and correct.

Executed on 9/22/10
(Date)

Arnold Boston
Signature of Petitioner

SWORN TO AND SUBSCRIBED before me this the 22 day of September 2010

Alme Sullivan
Notary Public

MY COMMISSION EXPIRES JULY 17, 2012

OR *

ATTORNEY'S VERIFICATION UNDER OATH SUBJECT TO PENALTY FOR PERJURY

I Swear (or affirm) under penalty of perjury that, upon information and belief, the foregoing is true and correct. Executed on _____
(Date)

Signature of Petitioner's Attorney

SWORN TO AND SUBSCRIBED before me this the _____ day of _____

Notary Public

Name and address of attorney representing petitioner
in this proceeding (if any)

* If petitioner is represented by counsel, Rule 32.6(a) permits either petitioner or counsel to verify the petition.

IN THE CIRCUIT COURT OF JEFFERSON COUNTY ALABAMA

DURRELL, BESTER *

Petitioner, *

VS. *

Case No. CC 08-3771-3772

STATE OF ALABAMA *

Respondent. *

PETITION FOR RELIEF FROM CONVICTIONS

AND SENTENCES PURSUANT TO RULE 32 ALA. CRIM. P.

Come now the Petitioner, Durrell Bester, and hereby pursuant to Rule 32 Ala.R.Crim.P., Petitions this Honorable Court for relief from convictions and sentences, and submits the following in support hereof:

I. Procedural History:

1. Petitioner, Durrell Bester, on April 8, 2009, was adjudged guilty on one count of Trafficking in Cocaine: one count of Failure to Affix Tax Stamp and one count of Possession of Drug Paraphernalia.

2. On May 26, 2009, Bester was sentenced, as a Habitual Offender to Life Without Parole for the Trafficking conviction; Fifteen years for the Stamp conviction and twelve months for the paraphernalia

3. On Direct Appeal, Bester raised three issues for review; 1) the State evidence was insufficient to establish that he constructively possessed the Cocaine entitling him to a judgment of acquittal; 2) Trial Counsel was ineffective and 3) that his sentence of Life Without Parole was illegally imposed.

The Court of Criminal Appeals affirmed the convictions in a memorandum opinion on April 16, 2010.

4. There being no other Appeals, Application or Motion pending in regards to the above cases, the instant petition for Relief from Convictions and Sentence, pursuant to Rule 32 Ala.R.Crim.P., follows:

II. GROUNDS OF PETITION:

A. DENIAL OF SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

B. DENIAL OF SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL.

III SUPPORTING FACTS:

(A1). Petitioner, Durrell Bester, was denied his Sixth Amendment Right to effective assistance of counsel at trial, when counsel fail to object to the Oath not being administered to the Petit Jury.

Petitioner avers that the evidence of record demonstrate that no Oath was administered to his Petit Jury as required

See §12-16-170 Ala. Code 1975.

On the morning of April 7, 2009, the record reflects, though the proceeding was not completely transcribed, that the Attorneys selected the Petit Jury and after selections, the Court heard evidence regarding a juror that heard spectators talk about the case, then the Court proceeded to instruct the Petit Jury as to the course of proceeding. (R. 24-45) Further, the record reflects that Counsel's gave opening arguments and the State called its first witness. (R.45) There is nothing in the record reflecting that the Petit Jury was sworn or that defense Counsel objected to the Court not swearing in the Petit Jury.

Petitioner contends that in Alabama it is well settled that the failure to administer the Oath to the Petit Jury renders the jury's verdict a nullity... and if the jury or any member thereof was not sworn, it was not the verdict of a jury. Jackson vs. State, 12 So.3d 720 Ala.Crim.App. (2007); Ex parte deramus, 721 So.2d 242 (Ala.1998).

Bester contends that Counsel unprofessional error was prejudicial to his substantive fundamental rights,

(A2). Petitioner was denied his Sixth Amendment Right to effective assistance of counsel when counsel fail to request a mistrial, when a juror disclosed that she heard spectators talking about the case in the courtroom.

The record reflects that immediately after the striking of the Petit Jury on the morning of April 7, 2009, the following occurred:

The Court: All right, ladies and gentlemen, let's talk a bit. Try to get you orientated.

A Juror: Your Honor? I believe I need to speak with you and counsel in chambers before we get started.

Or there is something I need to discuss with you.

The Court: Okay. Come on back in chambers.

(Wherefore, the following was heard in chambers with the defendant and all counsel, along with the juror.

The Court: Okay. Ms. Allister, you have something you want to tell the Court?

Juror: Yes Sir. Just before we get started, I wanted to let you know that I did leave when you gave us the break, and I don't know if there were Mr. Bester's friends or family that were sitting behind me. But they were having discussions about, it sounded like whether they believe the Search Warrant was proper or not.

And also heard a statement, "I know he doesn't want to go back to jail," and he's been priorly convicted of another crime. And I don't believe that would influence my decision. I certainly know I don't consider that evidence but I just wanted to make all the parties aware that I heard these discussions.

The Court: Okay. Would you do me a favor and have a seat right out there, please?

(Whereupon the juror complies.)

The Court: They shouldn't have been talking in the Courtroom.

Mr. Benson: (Defense Counsel) I will certainly instruct them to cease the desist, your Honor, I apologize.

The Court: Well, I only have one extra.

Mr. Anderton: (Prosecutor) Judge of course--

The Court: Wasn't she the last one to come on the jury

Mr. Anderson: She was, yes, Your Honor. Mr. Jenkins was sitting next to her, and I don't know how long these discussions have been going on. Or if Mr. Jenkins or any of the other jurors heard Mr. Bester's family speaking in those terms. How long they've been doing, how loud they've been doing it, even during the break while --before we reconvened this time.

I don't know. I know Mr. Jenkin is on the last guy I can't remember his name, he's not on, I don't think, concern.

But Ms. Allister and Mr. Jenkins were on that final row.

The Court: Right, Right.

Maybe he left during the break.

Mr. Benson: I believe he did your Honor.

The Court: I don't know, I wasn't out there.

Mr. Anderton: Of course, I don't either.

But I also don't know if they continued those discussion while the jurors were back in the room. But, talking about the facts of the case, like that, around people that they know are potential jurors in this case.

(Brief Pause)

The Court: All Right. What do you suggest we do with her? We could excuse her. And just let her be the alternative

Mr Anderton: She has said-- She has said that, you know, she doesn't consider that evidence.

MR. Benson: Right.

(R. 25-28)

Petitioner contends that the Trial Court after hearing the juror and arguments of counsels, excluded the juror.

(R. 29-31)

Bester avers that Trial Counsel did not move for a mistrial or instructions to the rest of the jurors to disregard anything that they had heard. This action was prejudicial to Bester, because there's a reasonable probability that under the facts of this case, the entire Petit Jury might have been unlawfully influenced by the comments the spectator made, which could have unlawfully influenced their verdict rendered.

Counsel error and omission deprived Bester of fundamental fair trial.

Petitioner was denied his Sixth Amendment Right to effective Assistance of counsel when counsel failed to object to the trial court allowing jurors to directly question witnesses during trial.

(A 3) Petitioner submits that during the course of his trial members of the Petit Jury were allowed to question witnesses.

Specifically, the record reflects that during the testimony of Michael Eaton, a Deputy with the Jefferson County Sheriff's Department and who participated in and secured and served the warrants, the record reflects the following:

" THE COURT: All right. Ladies and gentlemen of the jury, if you have a burning question in your mind as a result of Officer Eaton's-- Deputy Eaton's testimony, I will allow you to ask it, if it is admissible. This is not an opportunity to clear a question you may have remaining in your mind as a result of the witness's testimony and the lawyer's questioning, and the procedure is that, if you wish to ask a question, I will approve the question, and then the witness will answer. Once you receive an answer from the witness, you should not comment concerning the witness's answer. Ok.

Does anyone here have a question for Deputy Eaton?

Yes Sir?

A JUROR: I'm not sure if I'm allowed to ask or not, is there a reason why the box wouldn't have been fingerprinted?

THE COURT: Do you know the answer to that question?

THE WITNESS: Because, Mr. bester had owned up to owning the luggage. I didn't see the need to have it fingerprinted, because he'd already told me that the bag was his.

THE COURT: Anyone else?

Yes Ma'am?

A JUROR: I'm just trying to understand where was the White plastic bag found? Was it found at the house or at the apartment?

THE COURT: Can you answer? Do you know the answer?

THE WITNESS: Yes, Sir--

MR. BENTON: But, Your Honor --

THE COURT: Come up.

(Side Bar).

THE COURT: Okay. He can't answer that question.

A JUROR: He cannot?

THE COURT: he cannot. Okay.

He cannot, that is all I can say.

Anyone else?

(No Response).

THE COURT: Any follow-up then for the State?

MR. ANDERSON: No, Sir.

THE COURT: I'm sorry. yes Sir?

A JUROR: I want to ask a question.

Where was the --- was the plastic bag in the truck-- when they stopped them, was the plastic bag in the truck, when he was taken to his Mother's house?

THE COURT: Okay. He can't answer that.

Any follow-up for the defense?

MR. BENSON: No, Your Honor.

THE COURT: All right. You may stand down."

Further during the testimony of Sgt. French, with the Jefferson County Sheriff's Department, the Trial Court allowed Juror's to question the witnesses. The Record reflects:

(R. 137-139, 142):

THE COURT: Any questions for Sgt. French? Yes, Sir.

A JUROR: You said they took two bags in and you said he brought a bag out. Did he bring the bag out or what---

THE WITNESS: No, I did not say he brought---

THE COURT: Okay. Wait, wait, wait, wait, wait.

We ask a question, then I approve it before we answer it, Okay? You didn't know that.

THE WITNESS: No, I didn't. I'm sorry.

THE COURT: Did you understand his question?

THE WITNESS: He said, I said they brought--- he took two bags in and brought one bag out.

THE JUROR: No, I mean to say, the White guy brought one one bag in and he brought one bag out. I think, didn't you say, he took his bag back out? He brought the bag back out.

THE COURT: Okay, that's the question. Did you say, did you say that?

THE WITNESS: No.

THE COURT: Okay, she said no. Yes, Sir?

A JUROR: My understanding of that, the same question.
Both Mr. Bester and his friend were both taking
White bags into the house.

THE COURT: Is that correct? Is the question?

A JUROR: Into the apartment, I'm sorry, not the house.

THE COURT: Okay.

THE WITNESS: That is correct.

THE COURT: Okay. Yes, Sir?

A JUROR: It seems as though before you said, they were
different types of bags. One was like a Walmart
plastic bag and one was a white garbage bag,
is that correct?

A JUROR: Okay. And can I ask one more then?
The White garbage bag that the White male brought
in, did that look like the White garbage bag
that you found at the apartment that had this
Pyrex jar-----

THE WITNESS: The White garbage bag that the White male
carried in was a larger one that was sitting
in the floor.

A JUROR: Right.

THE WITNESS: That had the Pyrex dish and other stuff.

THE COURT: Okay. Anyone else?

(No response)

(Id. 137-139).

Petitioner, further submits that the record reflects at R. 142, the Jurors further questioned the witnesses:

THE COURT: Yes Sir?

A JUROR: It was the bag that was behind the stereo, the bag that allegedly--- that had the cocaine; can I ask that question? That cocaine that was found in or was it the other bag?

THE COURT: You can answer it.

THE WITNESS: It was the bag that was behind the stereo that had the cocaine in it.

THE COURT: Anyone else?

(No response)" (Id. at 142).

Bester contends that he was prejudiced by Counsel's failure to object to the Trial Court's solicitation of questions from the Petit Jury without any special request from them. The questions asked by certain jurors could have influenced the individualized determination of the facts by other jurors, and thus, deprived Petitioner of an individualized verdict.

In UNITED STATES VS. AJMAL, 67 F.3rd. 12, 15 (2nd Cir. 1995), the Court of Appeals for the Second Circuit held that the Trial Court exceeded its discretion by allowing extensive Juror questioning as a matter of course and by inviting questions at the end of each witness's testimony, that the Court stated, that the Trial Court's decision to invite and allow extensive juror questioning was not necessitated by the factual intricacies of that case. (Id.).

Petitioner contends that Counsel's unprofessional error in failing to Object to the Court's actions was Prejudicial to the Petitioner's Fundamental Right to a fair trial.

(A 4). Petitioner was denied his Sixth Amendment Right to Effective Assistance of Counsel when Counsel deprived him of his right to Testify in his own defense.

Bester contends that his trial counsel, WILLIAM BENSON, deprived him of his Fundamental Right to Testify in his own defense, and that Counsel's action prejudiced his defense and deprived the Petitioner of a fundamental Fair Trial.

Petitioner submits that prior to Trial, he made known to counsel that he wanted to testify, and let the jury know that he did not possess the drugs and did not have knowledge of the drugs being in the residence. Counsel agreed, and stated that my Mother, who will also testify, that the White guy had the

sack with the drugs would corroborate my testimony. (R. 186). However, the records reflect, that after the State had rested, Mr. Benson only called my Mother, Dorothy Bester, as a Defense witness, and rested the Defense without calling me as a witness in my own defense. (R. 187-203).

Counsel informed me, that I did not need to testify, that the Jury heard my version through my Mother, and that the Prosecution would be able to Cross-Examine you, and bring up your prior convictions. I still insisted on testifying, but counsel refused to let me.

Bester contends that the Right of the accused to testify is a personal right that can only be waived by the accused himself. SEE: ROCK VS. ARKANSAS, 483 U.S. 44 (1987) and REEVES VS. STATE, 974 So.2d. 314, 325 (ALA.CR.app. 2007).

Petitioner contends, he was prejudiced by Counsel's unprofessional errors, as there exists, under the circumstances, a reasonable probability that had the Jury heard Bester's Testimony, the results of the proceeding would have been different.

(A- 5). Petitioner was denied his Sixth Amendment Right to Effective Assistance of Counsel, when counsel failed to request and/ or object to the Court not giving Jury Instructions on the Failure of Bester to testify.

In CARTER VS. KENTUCKY, 450 U.S. 288 (1981), the Supreme Court held that the Fifth Amendment requires that a Criminal Trial Judge must give a no-adverse-inference jury instruction when requested by a Defendant to do so. *Id.* at 300.

In the instant case, because Counsel failed to request and /or object to the lack of such, the jury was allowed to infer that Bester was Guilty because he did not testify.

Counsel's unprofessional error and omission was prejudicial to the Fundamental Substantive Rights of the Petitioner.

INEFFECTIVE APPELLATE COUNSEL CLAIM---- (GROUND B):

(B-1). Petitioner was denied his Sixth Amendment Right to Effective Assistance of Counsel on Direct Appeal, when Counsel failed to preserve and/or raise for Appellate review the following claims:

A. The Trial Court's denial of Bester's request for New Counsel. The Record reflects at the outset of Trial, Bester requested a new Counsel, and the Court denied the request without inquiry, depriving Bester of his right to Counsel of choice. (R. 16). Trial Counsel, WILLIAM BENSON even requested to Withdraw himself. (R. 17).

B. The Trial Court's denial of Bester's Motion to Suppress. The Record reflects at the outset of Trial, Bester moved to Suppress, on the grounds that the Search was illegal and based on an involuntary consent. (R. 18-20).

C. The Trial Court abused it's discretion in finding Bester a Violent Offender and sentencing him to LIFE WITHOUT PAROLE. The Record reflects that Bester was never afforded allocution before sentence was announced. (R. 1-19, 20-26).

Appellate Counsel attempted to raise this issue on Appeal, however, the Appellate Court found the claim was Waived because counsel cited no legal authority to support the claim. (SEE MEMORANDUM OPINION in BESTER VS. STATE, CR-08-1636).

Bester contends that his Appellate Counsel on Direct Appeal, AMRTIN WEINBERG, errors and omissions in not raising the above meritorious claims, was outside the range of professional assistance required of Attorney's representing a Defendant in a First Appeal as a matter of Right. SEE: EVITTS VS. LUCEY, 469 U.S. 387 (1985); and STRICKLAND VS. WASHINGTON, 466 U.S. 668 (1984). Bester contends that had Appellate Counsel raised the above claims, there is a reasonable probability that the results of Bester's Direct Appeal would have been different. SEE: BRYANT VS. STATE, 739 So.2d. 1138 (ALA.CR.APP. 1998).

Case Number
 CC 08 - 3771
 CC 08 - 3772
 ID YR NUMBER
 (To be completed
 by Court Clerk)

IN FORMA PAUPERIS DECLARATION

IN THE CIRCUIT COURT OF JEFFERSON COUNTY ALABAMA

[Insert appropriate court]

DURRELL BESTER

(Petitioner)

vs.

STATE OF ALABAMA

(Respondent(s))

FILED IN OFFICE
 CIRCUIT CRIMINAL

DEC 06 2010

ANNE-MARIE ADAMS
 CLERK

DECLARATION IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

I, DURRELL BESTER #216904, declare that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

1. Are you presently employed? Yes _____ No X

a. If the answer is "yes", state the amount of your salary or wages per month, and give the name and address of your employer.

N/A

b. If the answer is "no", state the date of last employment and the amount of the salary and wages per month which you received.

2007 \$1,000.00 per month

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession, or other form of self-employment?

Yes _____ No X

b. Rent payments, interest, or dividends?

Yes _____ No X

c. Pensions, annuities, or life insurance payments?

Yes _____ No X

d. Gifts or inheritances?

Yes _____ No X

e. Any other sources?

Yes X No _____

If the answer to any of the above is "yes", describe each source of money and state the amount received from each during the past twelve months.

I receive funds from family members
to purchase necessities from prison
canteen.

3. Do you own cash, or do you have money in a checking or savings account?

Yes X No

(Include any funds in prison accounts.)

If the answer is "yes", state the total value of the items owned.

See below certificate

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes No X

If the answer is "yes", describe the property and state its approximate value.

N/A

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

N/A

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Executed on 11-22-10
 (Date)

x Durrell Bester
 Signature of Petitioner

CERTIFICATE

I hereby certify that the petitioner herein has the sum of \$ 21.49 on account to his credit at the institution where he is confined. I further certify that petitioner likewise has the foregoing secured to his credit according to the records of said Homan CF institution:

11/23/10
 DATE

[Signature]
 AUTHORIZED OFFICER OF INSTITUTION

STATE OF ALABAMA
DEPARTMENT OF CORRECTIONS
HOLMAN CORRECTIONAL FACILITY

AIS #: 216904

NAME: BESTER, DURRELL

AS OF: 11/23/2010

MONTH	# OF DAYS	AVG DAILY BALANCE	MONTHLY DEPOSITS
NOV	7	\$549.14	\$0.00
DEC	31	\$316.64	\$0.00
JAN	31	\$131.59	\$215.00
FEB	28	\$227.46	\$480.00
MAR	31	\$116.06	\$410.00
APR	30	\$79.27	\$300.00
MAY	31	\$46.75	\$205.00
JUN	30	\$17.93	\$320.00
JUL	31	\$16.30	\$315.00
AUG	31	\$14.51	\$405.00
SEP	30	\$42.87	\$480.00
OCT	31	\$19.75	\$425.00
NOV	23	\$28.65	\$340.00

IN THE CIRCUIT COURT, TENTH JUDICIAL CIRCUIT
JEFFERSON COUNTY, ALABAMA
CRIMINAL DIVISION

FILED IN OFFICE
CIRCUIT CLERK

JAN 03 2011

ANNE-MARIE ADAMS
CLERK

DURRELL BESTER,

Petitioner,

vs.

STATE OF ALABAMA,

Respondent,

CASE NO. CC 2008-3771.60
CC 2008-3772.60

MOTION TO DISMISS RULE 32 PETITION

COMES NOW the State of Alabama, by and through Brandon Falls, District Attorney for the Tenth Judicial Circuit, Jefferson County, Alabama, and says in response to the petition heretofore filed the following:

1. Respondent respectfully requests this Honorable Court take judicial notice of its own records in the above-cited case.
2. The State of Alabama denies each and every allegation in Petitioner's motion jointly and severally and demands strict proof thereof.
3. Petitioner was convicted of Trafficking in Cocaine and Failure to Affix Tax Stamp on April 8, 2009 and sentenced to Life without Parole and Fifteen (15) years to be served concurrently. Petitioner appealed and said conviction was upheld on June 23, 2010.
4. Petitioner is precluded from relief by operation of law as his claims were raised at trial. Rule 32.2(a)(2), Alabama Rules of Criminal Procedure.

ORIGINAL

5

5. Petitioner is precluded from relief by operation of law as his claims could have been raised at trial. Rule 32.2(a)(3), Alabama Rules of Criminal Procedure.

6. Petitioner is precluded from relief by operation of law as his claims were raised on appeal. Rule 32.2(a)(4), Alabama Rules of Criminal Procedure.

7. Petitioner is precluded from relief by operation of law as his claims could have been raised on appeal. Rule 32.2(a)(5), Alabama Rules of Criminal Procedure.

8. Petitioner's claims are precluded because any claim that counsel was ineffective must be raised as soon as practicable, either at trial, on direct appeal, or in the first Rule 32 petition, whichever is applicable." Rule 32.2(d), Alabama Rules of Criminal Procedure.

9. Without waiving any of the aforementioned procedural bars, Respondent denies Petitioner's claims that he received ineffective assistance of trial and appellate counsel. Petitioner makes the following specific claims:

A. Ineffective Assistance of Trial Counsel

A1. Trial counsel failed to object to the oath not being administered to the petit jury.

Claims regarding the swearing of the venire are non-jurisdictional; therefore, Petitioner's claim is waived because it could have been, but was not, raised at trial or on appeal. Furthermore, the entire jury venire is sworn in by the Court Administrator before being disbursed to the various courtrooms. This oath tracks the language contained in Rule 12.1(c), Ala.R.Crim.P., which pertains to the qualification of the jury venire, and it also satisfies the oath required under §12-16-170, Code of Alabama, 1975. See Deramus v. State, 721 So.2d 239; (Ala.Crim.App. 1997). Additionally, the record reflects that the

individual jurors sent to the courtroom for Petitioner's trial was sworn in after entering the courtroom (see Exhibit "A" attached). Thus, Petitioner's claim is without merit.

A2. Trial counsel failed to request a mistrial after a juror disclosed that she heard spectators talking about the case in the courtroom during a break.

Immediately after hearing the comments, the juror disclosed the same to the Court. Petitioner's counsel then had a lengthy discussion in chambers with the Judge, juror and prosecutor (see Exhibit "B" attached) wherein it was determined that only the disclosing juror and one other were seated on the back row in front of the spectators and that the other juror was believed to have stepped outside during the break. The Court then suggested that the disclosing juror be dismissed to prevent a possible claim of jury contamination later on. Counsel, *after discussion with Petitioner*, agreed to the dismissal of the juror. Petitioner's mere speculation that the entire petit jury *might* have been influenced by the spectator's comments is unsupported by the facts.

A3. Trial counsel was ineffective for failing to object to the Court allowing the jurors an opportunity to question the witnesses.

Petitioner claims that questions asked by jurors *may* have influenced the determination of facts by other jurors. Again, Petitioner's claim is mere speculation. Besides the fact that the Judge qualified the questions being asked before allowing the witness to answer the question, it is well settled that "whether to allow jurors to question witnesses is a matter within the trial judge's discretion." United States v. Rawlings, 380 U.S. App. D.C. 378; 522 F.3d 403; 2008 U.S. App. LEXIS 8005. (See also, United States v. Callahan, 588 F.2d 1078, 1979 U.S. App. LEXIS 17143; United States v. Collins, 226

F.3d 457, 2000 U.S. App. LEXIS 22237; United States v. Richardson, 233 F.3d 1285; 2000 U.S. App LEXIS 27467.

A4. Trial counsel denied Petitioner his right to testify on his own behalf.

A defendant desiring to testify on his own behalf must make his desire known to his attorney. By his own admission, Petitioner states that, after his mother testified, his attorney advised him that there was no need for him to testify since his mother's testimony encompassed what he was going to say and that, if he did testify, his priors could come out. "Trial counsel may advise the defendant, and should do so in the strongest possible terms, not to testify if counsel believes that it would not be wise for the defendant to testify." United States v. Teague, 953 F.2d 1525 (11th Circuit 1992). Although Petitioner claims that there is a reasonable probability that the outcome would have been different if the jury had heard his testimony; that is not likely in light of the evidence against him, and the fact that the jury apparently discounted his mother's testimony which was substantially the same as Petitioner's would have been.

A5. Trial counsel failed to request and/or object to the Court not giving jury instructions on Petitioner's failure to testify.

What Petitioner is referring to is a "no adverse inference" instruction. As discussed in the *Carter* case which Petitioner cites, a trial judge must give such an instruction when requested by a defendant to do so. In this case, the Court was not requested by the defendant to do so, therefore, counsel had no cause to object. Furthermore, the Court instructed the jury that the defendant had no burden of proof and was presumed innocent. As for counsel's failure to specifically request such an instruction, Petitioner's claim is precluded because it could have been but was not raised on appeal.

The Alabama Supreme Court has delineated a two-prong test based on *Strickland v. Washington*, 466 U.S. 668 (1984), to determine whether counsel was effective. *See Ex Parte Lawley*, 512 So.2d 1370 (Ala.Crim.App.1987). First, the Petitioner must prove that his counsel was deficient; and second, the Petitioner must prove that his counsel's performance prejudiced him such that the outcome would be different but for his counsel's ineffective performance. *Lawley*, 512 So.2d 1370, 1372 (Ala.Crim.App. 1987). Therefore, "to establish ineffective assistance of counsel, the accused must show that his attorney's performance was so deficient as to fall below the objective standard of reasonableness and further, that this deficiency actually prejudiced him and deprived him of a fair trial." *Stringfellow v. State*, 485 So.2d 1238 (Ala.Crim.App. 1986); *See also Daniels v. State*, 650 So. 2d 544, 552 (Ala. Crim. App. 1995) and *Dobyne v. State*, 805 So. 2d 733, 743 (Ala. Crim. App. 2000). Petitioner has failed to meet this burden and his claims are due to be denied.

B. Ineffective Assistance of Appellate Counsel

Petitioner argues that appellate counsel was ineffective in failing to raise the following issues on appeal which Petitioner describes as "meritorious claims".

B1. Trial Court's denial of Petitioner's request for new counsel which deprived him of his right to counsel of his choice.

First of all, Petitioner has a right to counsel not counsel of his choice. Second, the only time Petitioner requested new counsel was when the trial was about to start and the Court was asking him if he wanted to take the State's plea offer or proceed to trial. His only response was "I really want to hire me another lawyer. Because I feel I'm not represented right." (See Exhibit "C" attached). Petitioner did not state any other reason

why he was requesting new counsel at this stage of the proceedings. "Once trial has begun a defendant does not have the unbridled right to reject assigned counsel and demand another... in order to warrant a substitution of counsel during trial, the defendant must show good cause...." McKee v. Harris, 649 F.2d 927, (U.S. App. 1981) LEXIS 12819. Petitioner's request was unfounded and not timely made. Therefore, the Court's denial of his request was proper. "The right to choose counsel is a shield and part of an accused's due process rights. It should not be used as a sword with the purpose of obstructing the orderly procedure of the courts or to interfere with the fair administration of justice." Robinson v. State, 581 So.2d 1197, (Ala.Crim.App. 1990) LEXIS 1752.

B2. Trial Court's denial of Petitioner's Motion to Suppress.

Petitioner's trial attorney made a motion to suppress based on his client's claim that the consent form signed by his mother was invalid due to her limited education and that it was signed after the search had taken place. The Court denied the motion. "A trial court's ruling on a motion to suppress will not be disturbed unless it is palpably contrary to the weight of the evidence." Patterson v. State, 659 So.2d 1014 (Ala.Cr.App. 1995). The Court heard testimony of the officers involved, particularly Sgt. French, who testified that she read the consent form to Petitioner's mother prior to the search. (See Exhibit "D" attached). Thus, the Court's decision was not *contrary to the weight of the evidence*.

B3. The trial Court abused its discretion in declaring Petitioner a violent offender and sentencing him to life without parole.

Although appellate counsel did raise this issue on appeal, he cited no legal authority; probably because he could not find any to support his position on the issue.

Petitioner had four prior felonies, two of which were for discharging a firearm into an occupied dwelling which are violent felonies as defined by §12-25-32(13), Code of Alabama, 1975. Furthermore, Petitioner was convicted of a Class A felony with a prior conviction for a Class A felony. Under these facts, life without parole was mandated under §13A-5-9(c)(4) Alabama Criminal Code. Thus, Petitioner's sentence was not an abuse of discretion.

"To administer effective assistance of counsel, appellate counsel is not required to raise each and every issue. Brownlee v. State, 666 So.2d 91, 99 (Ala.Crim.App. 1995). "Winnowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." Smith v. Murray, 477 U.S. 527, 536 (1986). Therefore, Petitioner's claims are due to be denied.

10. Respondent avers that no material issue of law or fact exists which would entitle the Petitioner to relief under Rule 32, and that no purpose would be served by any further proceedings. Rule 32.7, Alabama Rules of Criminal Procedure.

WHEREFORE, PREMISES CONSIDERED, and in consideration of Rule 32.7(d), ALABAMA RULES OF CRIMINAL PROCEDURE, Respondent, the State of Alabama, respectfully moves this Honorable Court to dismiss the above styled petition without an evidentiary hearing.

Respectfully submitted this 31st day of January, 2011.



F. BRADY RIGDON
Deputy District Attorney

Office of the District Attorney
801 R. Arrington, Jr. Blvd. N.
Birmingham, AL 35203
Phone: (205) 325-5252
Facsimile: (205) 325-5266

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Motion to Dismiss Rule 32 Petition via U.S. Mail postage prepaid and properly addressed on this the 2nd day of January, 2011, as follows:

Durrell Bester
Holman Correctional Facility
Holman 3700
Atmore, AL 36503



F. BRADY RIGDON
Deputy District Attorney

EXHIBIT "A"

1 you to renew your motion to suppress, along
2 with your timely motion for judgement of
3 acquittal at the conclusion of all the
4 evidence in the case.

5 MR. BENSON: Thank you, Judge.

6 THE COURT: All right.

7 (Whereupon, State's Exhibit
8 Numbers 1 through 14 were marked
9 for identification.)

10 V O I R D I R E.

11 April 6th, 2009 - 2:30 p.m.

12 (Whereupon, the following was in
13 open court with the Defendant and
14 counsel present.)

15 (Whereupon, a jury venire was
16 brought in and sworn, the
17 indictment was read, the venire
18 was qualified and identified,
19 after which the following was had
20 and done.)

21 (Whereupon, special questions on
22 voir dire examination were asked
23 of the jury venire by counsel for
24 the State, there being no
25 objections or exceptions taken

EXHIBIT "B"

1 Your Honor.

2 THE COURT: What says the defense?

3 MR. BENSON: The defense is satisfied,
4 Your Honor.

5 THE COURT: Ladies and gentlemen, to
6 those of you all who were not selected, we
7 thank you and appreciate your service in
8 jury selection in this case.

9 Would you please return to the big jury
10 room across the street for further service
11 during week? Have a great week.

12 (Whereupon, those not selected
13 were released.)

14 THE COURT: All right, ladies and
15 gentlemen, let's talk a bit. Try to get you
16 orientated.

17 A JUROR: Your Honor? I believe I need
18 to speak with you and counsel in chambers
19 before we get started.

20 Or there's something I need to discuss
21 with you.

22 THE COURT: Okay. Come on back in
23 chambers.

24 (Whereupon, the following was
25 heard in chambers with the

1 defendant and all counsel, along
2 with the juror.)

3 THE COURT: Okay. Ms. McAlister, you
4 have something you want to tell the Court?

5 JUROR: Yes, sir. Just before we get
6 started, I wanted to let you know that I did
7 leave when you gave us the break, and I
8 don't know if these were Mr. Bester's
9 friends or family that were sitting behind
10 me. But they were having discussions about,
11 it sounded like whether they believe the
12 search warrant was proper or not.

13 And also heard a statement, "I know he
14 doesn't want to go back to jail," and I
15 don't know if that means his initial arrest
16 or he's been priorly convicted of another
17 crime. And I don't believe that would
18 influence my decision. I certainly know I
19 don't consider that evidence. But I just
20 wanted to make all the parties aware that I
21 heard these discussions.

22 THE COURT: Okay. Would you do me a
23 favor and have a seat right outside there,
24 please?

25 (Whereupon, the juror complies.)

1 THE COURT: They shouldn't have been
2 talking in the courtroom.

3 MR. BENSON: I will certainly instruct
4 them to cease and desist, Your Honor, I
5 apologize.

6 THE COURT: Well, I only have one
7 extra.

8 MR. ANDERTON: Judge, of course --

9 THE COURT: Wasn't she the last one to
10 come on the jury?

11 MR. ANDERTON: She was, yes, Your
12 Honor. Mr. Jenkins was sitting next to her,
13 and I don't know how long these discussions
14 have been going on. Or if Mr. Jenkins or
15 any of the other jurors heard Mr. Bester's
16 family speaking in those terms. How long
17 they've been doing, how loud they've been
18 doing it, even during the break while --
19 before we reconvened this time.

20 I don't know. I know Mr. Jenkins is on
21 the last guy - I can't remember his name,
22 he's not on - he's not on, I don't think,
23 concern.

24 But Ms. McAlister and Mr. Jenkins were
25 on that final row.

1 THE COURT: Right, right.

2 Maybe he left during the break.

3 MR. BENSON: I believe he did, Your
4 Honor.

5 THE COURT: I don't know, I wasn't out
6 there.

7 MR. ANDERTON: Of course, I don't
8 either.

9 But I also don't know if they continued
10 these discussions while the jurors were back
11 in the room. But, talking about the facts
12 of the case, like that, around people that
13 they know are potential jurors in this case.

14 (Brief pause.)

15 THE COURT: All right. What do you
16 suggest we do with her?

17 We could excuse her. And just let her
18 be the alternate.

19 MR. ANDERTON: She has said -- she has
20 said that, you know, she doesn't consider
21 that evidence.

22 MR. BENSON: Right.

23 MR. ANDERTON: And she was quite
24 honestly forthright enough to come to the
25 Court on her own, and not even in answering

1 a question, "Do you need to talk to us in
2 the back room?", she kind of did it on here
3 own.

4 THE COURT: She is the alternate.

5 MR. BENSON: Right.

6 THE COURT: I guess, we can just tell
7 her don't talk to anybody else.

8 MR. BENSON: And Your Honor, she is an
9 attorney --

10 THE COURT: But there is risk of
11 contamination.

12 I'm sorry?

13 MR. BENSON: She is an attorney, if I
14 remember correctly. And so I think that,
15 you know, she's aware of the process and
16 can put that aside.

17 THE COURT: Well, I don't want him
18 coming up later saying, well, my attorney
19 should have got her off the jury, so I
20 didn't have fair trial, so give me a new
21 trial.

22 I'm thinking the safest thing to do is
23 just exclude her. I mean, she seems like
24 she's a real, you know, nice lady, and would
25 be a good juror. But as it stands, she's

1 the alternate.

2 So since she's already the alternate.

3 And this case is not going to last but
4 a day, right?

5 MR. ANDERTON: I wouldn't expect it to
6 be any more than that.

7 THE COURT: So I think the safest thing
8 to do, and the best thing to do for him, so
9 as not to help make any issues. Is just to
10 be exclude her and let her go. Before she
11 has any contact with the other jurors. And
12 that way he can't speculate as to whether or
13 not she said something to somebody during a
14 break, or lunch, or while they, you know,
15 back in the jury room.

16 MR. ANDERTON: Judge, may I make the
17 suggestion, that we give Mr. Benson and
18 Mr. Bester a moment to talk among
19 themselves? It may be that he would have
20 just as big an argument on appeal, by saying
21 she should have not been excused.

22 THE COURT: Well, she's already the
23 alternate, she's not on the jury.

24 MR. ANDERTON: I understand.

25 THE COURT: You know, she's just the

1 . . . alternate.

2 You have something you wish to add for
3 the record?

4 MR. BENSON: Your Honor, we're in favor
5 of the Court's position.

6 MR. ANDERTON: Okay.

7 MR. BENSON: That she should be
8 excluded.

9 THE COURT: Have you talked to your
10 client?

11 MR. BENSON: No -- Well, if you mind
12 just giving me a moment I'll talk to him.

13 THE COURT: Okay.

14 (Off the record.)

15 MR. BENSON: Your Honor, my client
16 concurs. This juror probably
17 should be excluded.

18 THE COURT: All right, I'm going to
19 exclude her. Okay.

20 Okay, next question. (Pause) Who are
21 those people out there, are they family?

22 MR. BENSON: The majority is family.
23 One of them won't be in, she's a potential
24 witness. So she'll be outside the
25 courtroom.

EXHIBIT "C"

1 And you wish to exercise your right to
2 a trial by jury or you wish to take the
3 State's offer of life?

4 THE DEFENDANT: I'm going to take my
5 right.

6 THE COURT: Sir?

7 (No response.)

8 THE COURT: Sir? I didn't hear you,
9 I'm sorry.

10 THE DEFENDANT: Could you repeat the
11 question?

12 MR. BENSON: Do you want the jury trial
13 or do you want to take the plea?

14 THE DEFENDANT: I really want to hire
15 me another lawyer. Because I feel I'm not
16 represented right.

17 THE COURT: Well, I didn't ask you
18 that. I need to know, we got a jury right
19 outside this courtroom, ready to go, and I
20 need to know if you want to take the life
21 sentence or do you want to go to trial?

22 (No response.)

23 (Brief Pause.)

24 MR. ANDERTON: Obviously, I'm not
25 trying to speak for Mr. Bester. Obviously,

1 but, I guess I just want to make it clear,
2 that there is a difference between a life
3 sentence and a life without parole sentence.
4 And perhaps Mr. Bester does not grasp the
5 difference.

6 THE COURT: Well, I think Mr. Bester
7 understands that life without parole means
8 you never get out of prison.

9 And a regular life sentence means that,
10 at some point, you would be eligible for
11 parole.

12 MR. ANDERTON: All right. Thank you.

13 MR. BENSON: Your Honor, at this time,
14 I think -- I mean, I'm sort of at a
15 difficult position here. My client has
16 asked for a new attorney, I would
17 respectfully request this Court to grant his
18 wish, if he doesn't feel like he's getting
19 the quality of representation he needs,
20 then --

21 THE COURT: I don't wait till the
22 moment of trial --

23 MR. BENSON: I understand, Judge --

24 THE COURT: -- to deal with attorney
25 issues.

1 Okay. So you understand that you wish
2 to proceed to trial; is that correct, Mr.
3 Bester?

4 THE DEFENDANT: I guess, yeah.

5 THE COURT: All right. You said you
6 had something on a motion to suppress,
7 Billy?

8 MR. BENSON: Yes, sir, on a motion to
9 suppress, Judge.

10 I believe what the State -- the
11 evidence the State will present, will be
12 that my client was under surveillance by the
13 police officers. He was seen leaving his
14 residence with a bag. And got into a pickup
15 truck belonging to another individual.

16 They followed him to his mother's
17 residence. He took the bag upstairs, then
18 came back downstairs without the bag. Left
19 with those individuals. Police continued to
20 follow the vehicle, pulled the vehicle over.

21 That's when they found the
22 paraphernalia. Then, went back to the
23 mother's residence. At that time, again,
24 this is what I believe the State is going to
25 state. The police officers asked the mother

EXHIBIT "D"

1 Q. All right. And did she indicate to you that
2 she would in fact show you around her apartment?

3 A. Yes, she did.

4 Q. All right. And that was prior to her ever
5 signing that particular piece of paper?

6 A. That's correct.

7 Q. All right. You asked her to sign a consent
8 form?

9 A. I asked her to sign a consent form.

10 Q. The writing on that document is whose
11 writing?

12 A. I want to say it's Deputy Roger Morris.

13 Q. Okay. All right. Were you present when the
14 consent to search form was filled out?

15 A. Yes, I was.

16 Q. All right. And did you in fact see Ms.
17 Bester sign that particular form?

18 A. I did.

19 Q. Do you know if anyone read that form to Ms.
20 Bester prior to her signing it?

21 A. Yes.

22 Q. Who did?

23 A. I read it to her.

24 Q. Okay. Tell us if you will what you read to
25 Ms. Bester prior to her signing the form?

1 A. Okay. It says:

2 "Consent to search premises, State of
3 Alabama, Jefferson County. I am, and then the
4 individual's name, a resident of whatever the
5 address is, do voluntarily consent and authorize
6 the following deputy sheriffs: Morris, Finley,
7 Sergeant French and Washington to search my
8 premises located at 1037 Apartment E Birmingham.

9 "To determine whether or not there is any
10 illegal narcotics or stolen property on my
11 premises. I hereby certify that I am over 18 years
12 of age and have a possessory interest into the
13 items of the said premises.

14 "I have not been -- I have not been made any
15 threats or promises by the above named personnel.
16 This 24th day March, 2008.

17 "I further affirm that I have been advised
18 of my constitutional rights."

19 Q. All right.

20 A. And then it's signed and then it has two
21 witnesses.

22 Q. All right. Who were the witnesses?

23 A. I think Roger Morris and myself.

24 Q. Okay. And did both of you watch Ms. Bester
25 sign that particular form?

1 A. Yes. Sitting in her living room.

2 Q. Does that form appear to be an exact copy --
3 an exact duplicate of the original form?

4 A. Yes.

5 Q. With the exception of that gold star up at
6 the top, in that photograph -- I mean in that
7 Xeroxed copy is black and white?

8 A. Yes.

9 Q. The holes and the State sticker?

10 A. That's it.

11 Q. But does it appear to be an exact duplicate?

12 A. It does.

13 Q. Other than those items?

14 A. It does.

15 MR. ANDERTON: State would move to
16 introduce State's Exhibit 15.

17 MR. BENSON: Defense would object based
18 on our discussion.

19 THE COURT: 15 is in.

20 (Whereupon, State's Exhibit Number
21 15 was received into evidence.)

22 Q. Now, Sergeant French, once Ms. Bester signed
23 that form, did she take you anywhere in the
24 apartment?

25 A. Yes, she did.

**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
CRIMINAL DIVISION**

STATE OF ALABAMA,)

Plaintiff,)

v.)

DURELL BESTER,)

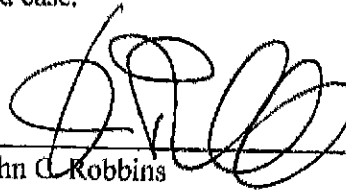
Defendant.)

CASE NUMBER:

CC 2008-3771.6

NOTICE OF APPEARANCE

COMES NOW the undersigned counsel, **JOHN C. ROBBINS**, and hereby enters his appearance in the above-styled case.



 John C. Robbins ROB060
 Counsel for the Defendant


OF COUNSEL:

ROBBINS LAW FIRM
2031 2nd Avenue North
Birmingham, AL 35203
(205) 320-5270
(205) 879-1247 *facsimile*

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing Notice of Appearance upon the following via first class United States Mail, properly addressed and postage thereon prepaid this the 14th day of February, 2011.

Brandon Falls
District Attorney
Criminal Justice Center
801 N. Richard Arrington, Jr. Blvd.
Birmingham, AL 35203



 OF COUNSEL

FILED IN OFFICE
CIRCUIT CRIMINAL

FEB 17 2011

ANNE-MARIE ADAMS
CLERK

SCANNED FEB 17 2011

ORIGINAL

ORIGINAL**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
CRIMINAL DIVISION**

STATE OF ALABAMA,)

Plaintiff,)

CASE NUMBER:

v.)

CC 2008-3771.6

DURELL BESTER,)

Defendant.)

AFFIDAVIT

My name is Durrell Bester. I am over the age of 18 years. I am currently in custody of the Alabama Department of Corrections and I am incarcerated Holman Correctional Facility. On July 13, 2011, I filed a Notice of Appeal and requested leave of Court to proceed with the appeal on an *in forma pauperis* basis. I am currently serving a life sentence without the possibility of parole. I do not have any financial assets. My family is without the financial resources to assist me in pursuing the appeal of this matter.

Durrell Bester
Durrell Bester

State of Alabama)
County of Escambia)

I, the undersigned, a Notary Public in and for said County, in said State, hereby certify that Durrell Bester, whose name is signed to the foregoing instrument, and who is known to me, acknowledged before me on this day that being informed of the contents of said instrument, executed the same voluntarily on the day the same bears date.

This notarization is prepared specifically and only for the Affidavit in support of the Notice of Appeal and Motion to Leave to Proceed *In Forma Pauperis* filed in connection with the above matter.

GIVEN under my hand and official seal this the 22nd day of July, 2011.

Sharon D. Jaffe
Notary Public
My commission expires: _____

My Commission Expires Oct. 5, 2013

FILED IN OFFICE
CIRCUIT CRIMINAL
JUL 27 2011
ANNE-MARIE ADAMS
CLERK

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing Notice of Appearance upon the following via first class United States Mail, properly addressed and postage thereon prepaid this the _____ day of July, 2011.

Brandon Falls
District Attorney
Criminal Justice Center
801 N. Richard Arrington, Jr. Blvd.
Birmingham, AL 35203

OF COUNSEL

14:32:48 1 you to renew your motion to suppress, along
14:32:54 2 with your timely motion for judgement of
14:32:58 3 acquittal at the conclusion of all the
14:33:00 4 evidence in the case.

14:33:00 5 MR. BENSON: Thank you, Judge.

14:33:02 6 THE COURT: All right.

7 (Whereupon, State's Exhibit
8 Numbers 1 through 14 were marked
9 for identification.)

10 V O I R D I R E.

11 April 6th, 2009 - 2:30 p.m.

12 (Whereupon, the following was in
13 open court with the Defendant and
14 counsel present.)

15 (Whereupon, a jury venire was
16 brought in and sworn, the
17 indictment was read, the venire
18 was qualified and identified,
19 after which the following was had
20 and done.)

21 (Whereupon, special questions on
22 voir dire examination were asked
23 of the jury venire by counsel for
24 the State, there being no
25 objections or exceptions taken

EXHIBIT

Court's

STATE OF ALABAMA
IN THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT
FOR JEFFERSON COUNTY, ALABAMA
CRIMINAL DIVISION

DURRELL BESTER,

APPELLANT,

VS.

Case Number: CC2008-3771,

CC2008-3772

STATE OF ALABAMA,

APPELLEE.

COURT REPORTER'S OFFICIAL TRANSCRIPT

The above-entitled case came on to be heard
before the Honorable Clyde E. Jones, Judge, on the
6th day of April, 2009 at or about 9:00 a.m.
before Alicia Martin, Official Court Reporter and
Commissioner.

STATE'S
EXHIBITCASE ACTION SUMMARY
CONTINUATION

Case Number:

cc 01-259
10 VN Number

Style:

STATE OF ALABAMA v. Bester, DurrellPage Number of Pages

DATE	ACTIONS, JUDGMENTS, CASE NOTES
5/4/01	The defendants desire to plead guilty having been made known to the Court, the Court addressed the defendant personally in the presence of his counsel in open court and ascertained that the defendant has a full understanding of what a guilty plea means and its consequences. A rights waiver form was executed by the Court, defendant and counsel for the defendant and is incorporated herein. The Court is satisfied that there is factual basis for the plea.
	<input checked="" type="checkbox"/> The defendant pleads guilty to <u>PMS1</u>
	<input type="checkbox"/> The defendant pleads guilty as youthful offender, underlying charge of
	Habitual offender hearing held, the Court finds <u> </u> prior felony conviction
	Sentencing Hearing <input checked="" type="checkbox"/> held; <input type="checkbox"/> waived.
	The Court asked the defendant if he/she had anything to say why the sentence of law should not be imposed against him/her and the defendant having had his/her say or had nothing to say, it is the judgment and sentence of the Court as follows:
	The Defendant is sentenced to the custody of <u> </u> The Department of Corrections for a period of <u>10</u> year(s), <u> </u> month(s) day(s). <u> </u> split <u> </u> to serve.
	The following costs are assessed against the defendant:
	<input checked="" type="checkbox"/> Costs of Court <u> </u> <input checked="" type="checkbox"/> Victim's Compensation \$ <u>50</u>
	<input type="checkbox"/> Fine \$ <u> </u> <input type="checkbox"/> Fair Trial Tax Fund \$ <u> </u>
	<input type="checkbox"/> Restitution to the victim(s) \$ <u> </u> <u> </u> ch
	Drug Demand Reduction Act Assessment \$ <u>1,000.00</u>
	The payment of Court ordered monies shall be a condition of parole, early release, S.I.R. and work release.
	The Clerk is authorized to accept part payments for all Court ordered monies. First payment due on <u> </u> per mo.
	The sentence is to be concurrent with the sentence imposed in Case number <u>09-910, 09-915, 09-918, 09-919, 09-920, 09-921, 09-922, 09-923, 09-924, 09-925, 09-926, 09-927, 09-928, 09-929, 09-930, 09-931, 09-932, 09-933, 09-934, 09-935, 09-936, 09-937, 09-938, 09-939, 09-940, 09-941, 09-942, 09-943, 09-944, 09-945, 09-946, 09-947, 09-948, 09-949, 09-950, 09-951, 09-952, 09-953, 09-954, 09-955, 09-956, 09-957, 09-958, 09-959, 09-960, 09-961, 09-962, 09-963, 09-964, 09-965, 09-966, 09-967, 09-968, 09-969, 09-970, 09-971, 09-972, 09-973, 09-974, 09-975, 09-976, 09-977, 09-978, 09-979, 09-980, 09-981, 09-982, 09-983, 09-984, 09-985, 09-986, 09-987, 09-988, 09-989, 09-990, 09-991, 09-992, 09-993, 09-994, 09-995, 09-996, 09-997, 09-998, 09-999, 10-000, 10-001, 10-002, 10-003, 10-004, 10-005, 10-006, 10-007, 10-008, 10-009, 10-010, 10-011, 10-012, 10-013, 10-014, 10-015, 10-016, 10-017, 10-018, 10-019, 10-020, 10-021, 10-022, 10-023, 10-024, 10-025, 10-026, 10-027, 10-028, 10-029, 10-030, 10-031, 10-032, 10-033, 10-034, 10-035, 10-036, 10-037, 10-038, 10-039, 10-040, 10-041, 10-042, 10-043, 10-044, 10-045, 10-046, 10-047, 10-048, 10-049, 10-050, 10-051, 10-052, 10-053, 10-054, 10-055, 10-056, 10-057, 10-058, 10-059, 10-060, 10-061, 10-062, 10-063, 10-064, 10-065, 10-066, 10-067, 10-068, 10-069, 10-070, 10-071, 10-072, 10-073, 10-074, 10-075, 10-076, 10-077, 10-078, 10-079, 10-080, 10-081, 10-082, 10-083, 10-084, 10-085, 10-086, 10-087, 10-088, 10-089, 10-090, 10-091, 10-092, 10-093, 10-094, 10-095, 10-096, 10-097, 10-098, 10-099, 10-100, 10-101, 10-102, 10-103, 10-104, 10-105, 10-106, 10-107, 10-108, 10-109, 10-110, 10-111, 10-112, 10-113, 10-114, 10-115, 10-116, 10-117, 10-118, 10-119, 10-120, 10-121, 10-122, 10-123, 10-124, 10-125, 10-126, 10-127, 10-128, 10-129, 10-130, 10-131, 10-132, 10-133, 10-134, 10-135, 10-136, 10-137, 10-138, 10-139, 10-140, 10-141, 10-142, 10-143, 10-144, 10-145, 10-146, 10-147, 10-148, 10-149, 10-150, 10-151, 10-152, 10-153, 10-154, 10-155, 10-156, 10-157, 10-158, 10-159, 10-160, 10-161, 10-162, 10-163, 10-164, 10-165, 10-166, 10-167, 10-168, 10-169, 10-170, 10-171, 10-172, 10-173, 10-174, 10-175, 10-176, 10-177, 10-178, 10-179, 10-180, 10-181, 10-182, 10-183, 10-184, 10-185, 10-186, 10-187, 10-188, 10-189, 10-190, 10-191, 10-192, 10-193, 10-194, 10-195, 10-196, 10-197, 10-198, 10-199, 10-200, 10-201, 10-202, 10-203, 10-204, 10-205, 10-206, 10-207, 10-208, 10-209, 10-210, 10-211, 10-212, 10-213, 10-214, 10-215, 10-216, 10-217, 10-218, 10-219, 10-220, 10-221, 10-222, 10-223, 10-224, 10-225, 10-226, 10-227, 10-228, 10-229, 10-230, 10-231, 10-232, 10-233, 10-234, 10-235, 10-236, 10-237, 10-238, 10-239, 10-240, 10-241, 10-242, 10-243, 10-244, 10-245, 10-246, 10-247, 10-248, 10-249, 10-250, 10-251, 10-252, 10-253, 10-254, 10-255, 10-256, 10-257, 10-258, 10-259, 10-260, 10-261, 10-262, 10-263, 10-264, 10-265, 10-266, 10-267, 10-268, 10-269, 10-270, 10-271, 10-272, 10-273, 10-274, 10-275, 10-276, 10-277, 10-278, 10-279, 10-280, 10-281, 10-282, 10-283, 10-284, 10-285, 10-286, 10-287, 10-288, 10-289, 10-290, 10-291, 10-292, 10-293, 10-294, 10-295, 10-296, 10-297, 10-298, 10-299, 10-300, 10-301, 10-302, 10-303, 10-304, 10-305, 10-306, 10-307, 10-308, 10-309, 10-310, 10-311, 10-312, 10-313, 10-314, 10-315, 10-316, 10-317, 10-318, 10-319, 10-320, 10-321, 10-322, 10-323, 10-324, 10-325, 10-326, 10-327, 10-328, 10-329, 10-330, 10-331, 10-332, 10-333, 10-334, 10-335, 10-336, 10-337, 10-338, 10-339, 10-340, 10-341, 10-342, 10-343, 10-344, 10-345, 10-346, 10-347, 10-348, 10-349, 10-350, 10-351, 10-352, 10-353, 10-354, 10-355, 10-356, 10-357, 10-358, 10-359, 10-360, 10-361, 10-362, 10-363, 10-364, 10-365, 10-366, 10-367, 10-368, 10-369, 10-370, 10-371, 10-372, 10-373, 10-374, 10-375, 10-376, 10-377, 10-378, 10-379, 10-380, 10-381, 10-382, 10-383, 10-384, 10-385, 10-386, 10-387, 10-388, 10-389, 10-390, 10-391, 10-392, 10-393, 10-394, 10-395, 10-396, 10-397, 10-398, 10-399, 10-400, 10-401, 10-402, 10-403, 10-404, 10-405, 10-406, 10-407, 10-408, 10-409, 10-410, 10-411, 10-412, 10-413, 10-414, 10-415, 10-416, 10-417, 10-418, 10-419, 10-420, 10-421, 10-422, 10-423, 10-424, 10-425, 10-426, 10-427, 10-428, 10-429, 10-430, 10-431, 10-432, 10-433, 10-434, 10-435, 10-436, 10-437, 10-438, 10-439, 10-440, 10-441, 10-442, 10-443, 10-444, 10-445, 10-446, 10-447, 10-448, 10-449, 10-450, 10-451, 10-452, 10-453, 10-454, 10-455, 10-456, 10-457, 10-458, 10-459, 10-460, 10-461, 10-462, 10-463, 10-464, 10-465, 10-466, 10-467, 10-468, 10-469, 10-470, 10-471, 10-472, 10-473, 10-474, 10-475, 10-476, 10-477, 10-478, 10-479, 10-480, 10-481, 10-482, 10-483, 10-484, 10-485, 10-486, 10-487, 10-488, 10-489, 10-490, 10-491, 10-492, 10-493, 10-494, 10-495, 10-496, 10-497, 10-498, 10-499, 10-500, 10-501, 10-502, 10-503, 10-504, 10-505, 10-506, 10-507, 10-508, 10-509, 10-510, 10-511, 10-512, 10-513, 10-514, 10-515, 10-516, 10-517, 10-518, 10-519, 10-520, 10-521, 10-522, 10-523, 10-524, 10-525, 10-526, 10-527, 10-528, 10-529, 10-530, 10-531, 10-532, 10-533, 10-534, 10-535, 10-536, 10-537, 10-538, 10-539, 10-540, 10-541, 10-542, 10-543, 10-544, 10-545, 10-546, 10-547, 10-548, 10-549, 10-550, 10-551, 10-552, 10-553, 10-554, 10-555, 10-556, 10-557, 10-558, 10-559, 10-560, 10-561, 10-562, 10-563, 10-564, 10-565, 10-566, 10-567, 10-568, 10-569, 10-570, 10-571, 10-572, 10-573, 10-574, 10-575, 10-576, 10-577, 10-578, 10-579, 10-580, 10-581, 10-582, 10-583, 10-584, 10-585, 10-586, 10-587, 10-588, 10-589, 10-590, 10-591, 10-592, 10-593, 10-594, 10-595, 10-596, 10-597, 10-598, 10-599, 10-600, 10-601, 10-602, 10-603, 10-604, 10-605, 10-606, 10-607, 10-608, 10-609, 10-610, 10-611, 10-612, 10-613, 10-614, 10-615, 10-616, 10-617, 10-618, 10-619, 10-620, 10-621, 10-622, 10-623, 10-624, 10-625, 10-626, 10-627, 10-628, 10-629, 10-630, 10-631, 10-632, 10-633, 10-634, 10-635, 10-636, 10-637, 10-638, 10-639, 10-640, 10-641, 10-642, 10-643, 10-644, 10-645, 10-646, 10-647, 10-648, 10-649, 10-650, 10-651, 10-652, 10-653, 10-654, 10-655, 10-656, 10-657, 10-658, 10-659, 10-660, 10-661, 10-662, 10-663, 10-664, 10-665, 10-666, 10-667, 10-668, 10-669, 10-670, 10-671, 10-672, 10-673, 10-674, 10-675, 10-676, 10-677, 10-678, 10-679, 10-680, 10-681, 10-682, 10-683, 10-684, 10-685, 10-686, 10-687, 10-688, 10-689, 10-690, 10-691, 10-692, 10-693, 10-694, 10-695, 10-696, 10-697, 10-698, 10-699, 10-700, 10-701, 10-702, 10-703, 10-704, 10-705, 10-706, 10-707, 10-708, 10-709, 10-710, 10-711, 10-712, 10-713, 10-714, 10-715, 10-716, 10-717, 10-718, 10-719, 10-720, 10-721, 10-722, 10-723, 10-724, 10-725, 10-726, 10-727, 10-728, 10-729, 10-730, 10-731, 10-732, 10-733, 10-734, 10-735, 10-736, 10-737, 10-738, 10-739, 10-740, 10-741, 10-742, 10-743, 10-744, 10-745, 10-746, 10-747, 10-748, 10-749, 10-750, 10-751, 10-752, 10-753, 10-754, 10-755, 10-756, 10-757, 10-758, 10-759, 10-760, 10-761, 10-762, 10-763, 10-764, 10-765, 10-766, 10-767, 10-768, 10-769, 10-770, 10-771, 10-772, 10-773, 10-774, 10-775, 10-776, 10-777, 10-778, 10-779, 10-780, 10-781, 10-782, 10-783, 10-784, 10-785, 10-786, 10-787, 10-788, 10-789, 10-790, 10-791, 10-792, 10-793, 10-794, 10-795, 10-796, 10-797, 10-798, 10-799, 10-800, 10-801, 10-802, 10-803, 10-804, 10-805, 10-806, 10-807, 10-808, 10-809, 10-810, 10-811, 10-812, 10-813, 10-814, 10-815, 10-816, 10-817, 10-818, 10-819, 10-820, 10-821, 10-822, 10-823, 10-824, 10-825, 10-826, 10-827, 10-828, 10-829, 10-830, 10-831, 10-832, 10-833, 10-834, 10-835, 10-836, 10-837, 10-838, 10-839, 10-840, 10-841, 10-842, 10-843, 10-844, 10-845, 10-846, 10-847, 10-848, 10-849, 10-850, 10-851, 10-852, 10-853, 10-854, 10-855, 10-856, 10-857, 10-858, 10-859, 10-860, 10-861, 10-862, 10-863, 10-864, 10-865, 10-866, 10-867, 10-868, 10-869, 10-870, 10-871, 10-872, 10-873, 10-874, 10-875, 10-876, 10-877, 10-878, 10-879, 10-880, 10-881, 10-882, 10-883, 10-884, 10-885, 10-886, 10-887, 10-888, 10-889, 10-890, 10-891, 10-892, 10-893, 10-894, 10-895, 10-896, 10-897, 10-898, 10-899, 10-900, 10-901, 10-902, 10-903, 10-904, 10-905, 10-906, 10-907, 10-908, 10-909, 10-910, 10-911, 10-912, 10-913, 10-914, 10-915, 10-916, 10-917, 10-918, 10-919, 10-920, 10-921, 10-922, 10-923, 10-924, 10-925, 10-926, 10-927, 10-928, 10-929, 10-930, 10-931, 10-932, 10-933, 10-934, 10-935, 10-936, 10-937, 10-938, 10-939, 10-940, 10-941, 10-942, 10-943, 10-944, 10-945, 10-946, 10-947, 10-948, 10-949, 10-950, 10-951, 10-952, 10-953, 10-954, 10-955, 10-956, 10-957, 10-958, 10-959, 10-960, 10-961, 10-962, 10-963, 10-964, 10-965, 10-966, 10-967, 10-968, 10-969, 10-970, 10-971, 10-972, 10-973, 10-974, 10-975, 10-976, 10-977, 10-978, 10-979, 10-980, 10-981, 10-982, 10-983, 10-984, 10-985, 10-986, 10-987, 10-988, 10-989, 10-990, 10-991, 10-992, 10-993, 10-994, 10-995, 10-996, 10-997, 10-998, 10-999, 11-000, 11-001, 11-002, 11-003, 11-004, 11-005, 11-006, 11-007, 11-008, 11-009, 11-010, 11-011, 11-012, 11-013, 11-014, 11-015, 11-016, 11-017, 11-018, 11-019, 11-020, 11-021, 11-022, 11-023, 11-024, 11-025, 11-026, 11-027, 11-028, 11-029, 11-030, 11-031, 11-032, 11-033, 11-034, 11-035, 11-036, 11-037, 11-038, 11-039, 11-040, 11-041, 11-042, 11-043, 11-044, 11-045, 11-046, 11-047, 11-048, 11-049, 11-050, 11-051, 11-052, 11-053, 11-054, 11-055, 11-056, 11-057, 11-058, 11-059, 11-060, 11-061, 11-062, 11-063, 11-064, 11-065, 11-066, 11-067, 11-068, 11-069, 11-070, 11-071, 11-072, 11-073, 11-074, 11-075, 11-076, 11-077, 11-078, 11-079, 11-080, 11-081, 11-082, 11-083, 11-084, 11-085, 11-086, 11-087, 11-088, 11-089, 11-090, 11-091, 11-092, 11-093, 11-094, 11-095, 11-096, 11-097, 11-098, 11-099, 11-100, 11-101, 11-102, 11-103, 11-104, 11-105, 11-106, 11-107, 11-108, 11-109, 11-110, 11-111, 11-112, 11-113, 11-114, 11-115, 11-116, 11-117, 11-118, 11-119, 11-120, 11-121, 11-122, 11-123, 11-124, 11-125, 11-126, 11-127, 11-128, 11-129, 11-130, 11-131, 11-132, 11-133, 11-134, 11-135, 11-136, 11-137, 11-138, 11-139, 11-140, 11-141, 11-142, 11-143, 11-144, 11-145, 11-146, 11-147, 11-148, 11-149, 11-150, 11-151, 11-152, 11-153, 11-154, 11-155, 11-156, 11-157, 11-158, 11-159, 11-160, 11-161, 11-162, 11-163, 11-164, 11-165, 11-166, 11-167, 11-168, 11-169, 11-170, 11-171, 11-172, 11-173, 11-174, 11-175, 11-176, 11-177, 11-178, 11-179, 11-180, 11-181, 11-182, 11-183, 11-184, 11-185, 11-186, 11-187, 11-188, 11-189, 11-190, 11-191, 11-192, 11-193, 11-194, 11-195, 11-196, 11-197, 11-198, 11-199, 11-200, 11-201, 11-202, 11-203, 11-204, 11-205, 11-206, 11-207, 11-208, 11-209, 11-210, 11-211, 11-212, 11-213, 11-214, 11-215, 11-216, 11-217, 11-218, 11-219, 11-220, 11-221, 11-222, 11-223, 11-224, 11-225, 11-226, 11-227, 11-228, 11-229, 11-230, 11-231, 11-232, 11-233, 11-234, 11-235, 11-236, 11-237, 11-238, 11-239, 11-240, 11-241, 11-242, 11-243, 11-244, 11-245, 11-246, 11-247, 11-248, 11-249, 11-250, 11-251, 11-252, 11-253, 11-254, 11-255, 11-256, 11-257, 11-258, 11-259, 11-260, 11-261, 11-262, 11-263, 11-264, 11-265, 11-266, 11-267, 11-268, 11-269, 11-270, 11-271, 11-272, 11-273, 11-274, 11-275, 11-276, 11-277, 11-278, 11-279, 11-280, 11-281, 11-282, 11-283, 11-284, 11-285, 11-286, 11-287, 11-288, 11-289, 11-290, 11-291, 11-292, 11-293, 11-294, 11-295, 11-296, 11-297, 11-298, 11-299, 11-300, 11-301, 11-302, 11-303, 11-304, 11-305, 11-306, 11-307, 11-308, 11-309, 11-310, 11</u>

133

 PENGAD-Byrd, M. J.
 Petitioner's
 Exhibit
 3

 State of Alabama
 Unified Judicial System

Form C-7 Rev. 3/79

 CASE ACTION SUMMARY
 CONTINUATION

Case Number

 CC 99 1278
 ID YN Number

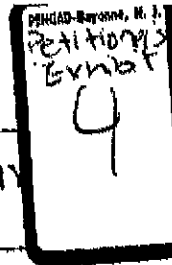
Style:

STATE OF ALABAMA v. Bester, Durrell

Page Number _____ of _____ Pages

DATE	ACTIONS, JUDGMENTS, CASE NOTES
2/27/01	The defendants desire to plead guilty having been made known to the Court, the Court addressed the defendant personally in the presence of his counsel in open court and ascertained that the defendant has a full understanding of what a guilty plea means and its consequences. A rights waiver form was executed by the Court, defendant and counsel for the defendant and is incorporated herein. The Court is satisfied that there is factual basis for the plea.
	<input checked="" type="checkbox"/> The defendant pleads guilty to <u>Discharge Firearm Into Occupied Vehicle</u> .
	<input type="checkbox"/> The defendant pleads guilty as youthful offender, underlying charge of _____.
	Habitual offender hearing held, the Court finds _____ prior felony conviction.
	Sentencing Hearing <input checked="" type="checkbox"/> held; <input type="checkbox"/> waived. <u>March 6th 4:00 p.m.</u> <u>March 13th 4:00 p.m.</u>
	The Court asked the defendant if he/she had anything to say why the sentence of law should not be imposed against him/her and the defendant having had his/her say or had nothing to say, it is the judgment and sentence of the Court as follows:
	The Defendant is sentenced to the custody of _____
	The Department of Corrections for a period of <u>10</u> year(s), _____ month(s) day(s). split to serve.
	The following costs are assessed against the defendant:
	<input type="checkbox"/> Costs of Court <input type="checkbox"/> Victim's Compensation \$ _____
	<input type="checkbox"/> Fine \$ _____ <input type="checkbox"/> Fair Trial Tax Fund \$ _____
	<input type="checkbox"/> Restitution to the victim(s) \$ _____
	<input type="checkbox"/> Drug Demand Reduction Act Assessment \$ _____
	<input type="checkbox"/> The payment of Court ordered monies shall be a condition of parole, early release, S.I.R. and work release.
	<input type="checkbox"/> The Clerk is authorized to accept part payments for all Court ordered monies. First payment due on _____ per mo.
	<input checked="" type="checkbox"/> The sentence is to be concurrent with the sentence imposed in Case number _____.
	<input checked="" type="checkbox"/> The defendant is given credit for all of the actual time spent incarcerated awaiting trial of this case unless he was serving time for another offense.
	<input type="checkbox"/> The defendant's application for probation is accepted and the Probation Office is ordered to make an investigation and report its findings to the Court.

M. J. Byrd
 Circuit Judge



Case Number

CC 99-970
ID YN NumberState of Alabama
Unified Judicial System

Form C-7 Rev. 2/79

CASE ACTION SUMMARY
CONTINUATION

Style:

STATE OF ALABAMA v. Bester, DurrellPage Number of Pages

DATE

ACTIONS, JUDGMENTS, CASE NOTES

2/27/01

The defendants desire to plead guilty having been made known to the Court, the Court addressed the defendant personally in the presence of his counsel in open court and ascertained that the defendant has a full understanding of what a guilty plea means and its consequences. A rights waiver form was executed by the Court, defendant and counsel for the defendant and is incorporated herein. The Court is satisfied that there is factual basis for the plea.

- ☒ The defendant pleads guilty to Nicholas Firearm Into Occupied Vehicle
- ☐ The defendant pleads guilty as youthful offender, underlying charge of

Habitual offender hearing held, the Court finds prior felony conviction

Sentencing Hearing ☐ held; ☐ waived. March 10th 4:00 p.m.

The Court asked the defendant if he/she had anything to say why the sentence of law should not be imposed against him/her and the defendant having had his/her say or had nothing to say, it is the judgment and sentence of the Court as follows:

The Defendant is sentenced to the custody of 10 year(s), month(s)
The Department of Corrections for a period of 10 year(s), month(s)
day(s). split to serve.

The following costs are assessed against the defendant:

☐ Costs of Court ☐ Victim's Compensation \$

☐ Fine \$ ☐ Fair Trial Tax Fund \$

☐ Restitution to the victim(s) \$

☐ Drug Demand Reduction Act Assessment \$

☐ The payment of Court ordered monies shall be a condition of parole, early release, S.I.R. and work release.

☐ The Clerk is authorized to accept part payments for all Court ordered monies. First payment due on per mo.

☒ The sentence is to be concurrent with the sentence imposed in Case number

☒ The defendant is given credit for all of the actual time spent incarcerated awaiting trial of this case unless he was serving time for another offense.

☐ The defendant's application for probation is accepted and the Probation Office is ordered to make an investigation and report its findings to the Court.

Man
Circuit Judge

FILED IN OFFICE
DEC 13 2011
JEFFERSON COUNTY CIRCUIT COURT
CRIMINAL
ANNE-MARIE ADAMS, CLERK

From ARAP-28 (back)			8/91	COURT OF CRIMINAL APPEALS DOCKETING STATEMENT		
H. POST-JUDGMENT MOTIONS: List all post-judgment motions by date of filing, type, and date of disposition (whether by trial court order or by the provisions of Rule 20.3 and 24.4 9(ARCP))						
DATE OF FILING			TYPE OF POST-JUDGMENT MOTION	DATE OF DISPOSITION		
Month	Day	Year		Month	Day	Year
12	9	2010	Rule 32 Petition challenging his sentence	6	21	2011

I. NATURE OF THE CASE: Without argument, briefly summarize the facts of the case

The trial court sentenced the Defendant on a trafficking in cocaine case to life without the possibility of parole even though the Defendant did not have any prior Class A felony convictions.

J. ISSUES ON APPEAL: Briefly state the anticipated issues that will be presented on appeal. (Attach additional pages if necessary)

Whether the trial court abused its discretion by sentencing the Defendant to life without the possibility of parole when the Defendant did not have any prior Class A felony convictions,

Whether the Defendant's sentence is cruel and unusual punishment under the facts of this case in violation of both the State and Federal Constitutions.

K. SIGNATURE:

12-13-2011

Date

Signature of Attorney/Party Filing this Form

State of Alabama Unified Judicial System Form ARAP-1C 8/91	REPORTER'S TRANSCRIPT ORDER - CRIMINAL <small>See Rules 10(c) and 11(b) of the Alabama Rules of Appellate Procedure (A.R.App.P.)</small>	Criminal Appeal Number <div style="border: 1px solid black; padding: 5px; font-size: 1.2em;"> <u>11-0207</u> </div>
--------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------

TO BE COMPLETED BY COUNSEL FOR THE APPELLANT OR BY THE APPELLANT IF NOT REPRESENTED AND FILED WITH THE WRITTEN NOTICE OF APPEAL OR FILED WITHIN 7 DAYS AFTER ORAL NOTICE OF APPEAL IS GIVEN.

☒ **CIRCUIT COURT**
☐ **DISTRICT COURT**
☐ **JUVENILE COURT**
 OF JEFFERSON COUNTY
DURRELL BESTER, Appellant

v. ☒ **STATE OF ALABAMA**
☐ **MUNICIPALITY OF** _____

Case Number <u>CC 2008-3771.60</u>	Date of Judgment/Sentence/Order <u>6/17/2011</u>
Date of Notice of Appeal Oral: _____ Written: <u>7/13/2011</u>	Indigent Status Granted: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No

PART 1. TO BE SIGNED IF THE APPEAL WILL NOT HAVE A COURT REPORTER'S TRANSCRIPT:
 I CERTIFY THAT NO REPORTER'S TRANSCRIPT IS EXPECTED AND THAT THE RECORD ON APPEAL SHALL CONSIST OF THE CLERK'S RECORD ONLY. IF THE APPEAL IS FROM DISTRICT COURT OR JUVENILE COURT, I ALSO CERTIFY (1) THAT A STIPULATION OF FACTS WILL BE INCLUDED IN THE CLERK'S RECORD AND THAT THE APPELLANT WAIVES HIS RIGHT TO A JURY TRIAL IF SO ENTITLED; OR (2) THAT THE PARTIES HAVE STIPULATED THAT ONLY QUESTIONS OF LAW ARE INVOLVED AND THAT THE QUESTIONS WILL BE CERTIFIED BY THE JUVENILE / DISTRICT COURT FOR INCLUSION IN THE CLERK'S RECORD (SEE RULE 28(A)(1), ALABAMA RULES OF JUVENILE PROCEDURE, AND §12-12-71, CODE OF ALABAMA 1975).

Signature _____ Date _____ Print or Type Name _____

PART 2. DESIGNATION OF PROCEEDINGS TO BE TRANSCRIBED. Request is hereby made to the court reporter(s) indicated below for a transcript of the following proceedings in the above referenced case (see Rule 10(c)(2), Alabama Rules of Appellate Procedure (A.R.App.P.)):

MARK PROCEEDINGS REQUESTED:

A. ☐ **TRIAL PROCEEDINGS** - Although this designation will include the judgment and sentence proceedings, a transcript of the organization of the jury and arguments of counsel must be designated separately.

B. ☐ **ORGANIZATION OF THE JURY** - This designation will include voir dire examination and challenges for cause. Note that in noncapital cases the voir dire of the jury will not be recorded unless the trial judge so directs. (See Rule 19.4, ARCP.)

C. ☐ **ARGUMENTS OF COUNSEL** - Note that in noncapital cases the arguments of counsel will not be recorded unless the trial judge so directs. (See Rule 19.4, ARCP.)

IN ADDITION TO ANY PROCEEDINGS DESIGNATED ABOVE, SPECIAL REQUEST IS HEREBY MADE TO INCLUDE THE FOLLOWING PROCEEDINGS IN THE REPORTER'S TRANSCRIPT PORTION OF THE RECORD ON APPEAL. (ATTACH ADDITIONAL PAGES IF NECESSARY):

ADDITIONAL PROCEEDINGS REQUESTED	DATE	COURT REPORTER(S)
D. <u>Hearing on Rule 32</u>	<u>6/21/2011</u>	<u>Alicia Martin</u>
E. <u>Sentencing hearing</u>	<u>4/8/2009</u>	<u>Alicia Martin</u>
F. _____	_____	_____
G. _____	_____	_____

IMPORT NOTICE: The court reporter who reported the proceedings for which a transcript is requested must be identified on this form to be effective. Additionally, it is important to note that the appellant may not be permitted to raise any issue on appeal relating to any proceedings in the case that are not specifically designated on this form for inclusion in the reporter's transcript. A general designation such as "all proceedings" is not sufficient. (See Rule 10(c)(2), A.R.App.P.)

PART 3. MUST BE SIGNED IF THE APPEAL WILL HAVE COURT REPORTER'S TRANSCRIPT:
 I CERTIFY THAT I HAVE DISTRIBUTED THIS FORM AS SET OUT BELOW. I ALSO CERTIFY (1) THAT I HAVE MADE SATISFACTORY FINANCIAL ARRANGEMENTS WITH EACH COURT REPORTER LISTED ABOVE FOR PREPARING HIS OR HER PORTION OF THE REPORTER'S TRANSCRIPT HEREIN REQUESTED; OR (2) THAT THE APPELLANT PROCEEDED AT TRIAL AS AN INDIGENT AND THAT STATUS HAS NOT BEEN REVOKED; OR, (3) THAT THE APPELLANT HAS BEEN GIVEN PERMISSION TO PROCEED ON APPEAL IN FORMA PAUPERIS.

Signature [Signature] Date 12-13-2011 Print or Type Name John C. Robbins

DISTRIBUTION: Original filed with Clerk of Trial Court and copies mailed to: (1) Clerk of the Court of Criminal Appeals, (2) the District Attorney, (3) the Attorney General or the municipal prosecutor in lieu of the District Attorney and the Attorney General if the appeal is from a municipal conviction, and (4) to each Court Reporter who reported proceedings designated for inclusion in the reporter's transcript.

STATE OF ALABAMA
IN THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT
FOR JEFFERSON COUNTY, ALABAMA
CRIMINAL DIVISION

DURRELL BESTER,

ORIGINAL

APPELLANT,

VS.

Case Numbers: CC2008-3771.60

&

CC2008-3772.60

STATE OF ALABAMA,

FILED IN OFFICE

JAN 27 2012

JEFFERSON COUNTY CIRCUIT COURT
CRIMINAL
ANNE-MARIE ADAMS, CLERK

APPELLEE.

COURT REPORTER'S OFFICIAL TRANSCRIPT

The above-entitled case came on to be heard
before the Honorable Clyde E. Jones, Judge, on the
13th day of June, 2011 at or about 9:25 a.m.
before Alicia Martin, Official Court Reporter and
Commissioner.

APPEARANCES

Representing the State of Alabama:

Mr. Michael Anderton,
Deputy District Attorney

Mr. F. Brady Rigdon,
Deputy District Attorney

Representing Defendant Bester:

Mr. John Robbins,
Attorney at Law
Birmingham, Alabama

EXAMINATION INDEXDEFENDANT'S WITNESSES:PAGE #

DURRELL BESTER, DEFENDANT

DIRECT BY MR. ROBBINS 26

CROSS BY MR. RIGDON 37

REDIRECT BY MR. ROBBINS 46

RECROSS BY MR. RIGDON 49

EXAMINATION INDEXSTATE'S WITNESSES:PAGE #

WILLIAM HOWARD BENSON, III, ESQ.

DIRECT BY MR. RIGDON 52

CROSS BY MR. ROBBINS 55

EXHIBIT INDEXCOURT'S EXHIBIT:MAR / ADM

1. Excerpt - Trial Record

9 9

EXHIBIT INDEXDEFENDANT'S EXHIBITS:MAR / ADM

1.	CAS - Defendant's Prior	46	46
2.	CAS - Defendant's Prior	46	46
3.	CAS - Defendant's Prior	46	46
4.	CAS - Defendant's Prior	46	46

PROCEEDINGS

Birmingham, Alabama

June 13th, 2011 - 9:25 a.m.

(Whereupon, the following was heard in open court with the Defendant and all counsel present.)

THE COURT: This is State of Alabama vs. Durrell Bester, Petitioner. Case number, CC08-3771.60 and 3772.60.

Anyone that's going to testify in this Rule 32 hearing, would you please stand and raise your right hand, at this time?

(Whereupon, those that are going to testify raise their hand and were duly sworn by the Court.)

THE COURT: All right. Call your first witness.

MR. ROBBINS: Your Honor, we would call Mr. Bester to the witness stand.

THE COURT: Come on up, Mr. Bester.

(The Defendant complies.)

THE COURT: Go ahead, please, sir.

MR. ROBBINS: Your Honor, can I make a -- while -- he's on the witness stand, so he

1 can hear this. So the Court can follow
2 where I'm going with this.

3 The Defendant filed a pro se Rule 32
4 Petition. And in that he set out several
5 grounds while he -- that he believes that he
6 is entitled to relief on his Rule 32
7 Petition.

8 The first ground -- and I've had a
9 chance to review everything, and comb
10 through it. And I want to focus in on what
11 I believe to be his strongest issue on this
12 Rule 32. But I do want to, at least, put on
13 the record his issues and let the Court
14 understand my thoughts on them.

15 And the first one he put in, is a
16 failure to object to the oath not being
17 administered to the petit jury.

18 I believe the record is clear on that
19 issue. That the jurors were sworn. And I
20 think it's clear that if you do not object
21 to that, that issue was waived.

22 He also --

23 THE COURT: I would also like to offer
24 into the record a copy of the -- that
25 portion of the transcript in the case.

1 Which indicates that: A jury venire
2 was brought in and sworn. The indictment
3 was read. The venire was qualified and
4 identified. And then the case begun.

5 This can be marked as a Court's
6 Exhibit.

7 Neil, hand that to the court reporter,
8 please.

9 THE BAILIFF: Yes, sir.

10 MR. ROBBINS: And the record is very
11 clear on that issue.

12 (Whereupon, Court's Exhibit Number
13 1 was marked and received in to
14 evidence.)

15 MR. ROBBINS: And the next issue he
16 raised is the failure to request a mistrial
17 when a juror disclosed to the Court that she
18 overheard spectators talking about this
19 particular case.

20 I looked at the record. And it was
21 clear that there was an in chambers
22 discussion with the lawyers and a juror.
23 That she overheard, I believe, family
24 members of Mr. Bester talking about the
25 case.

1 The juror came forward. Disclosed
2 that. And it was also determined that she
3 was an alternate. So that juror never
4 actually set on the case.

5 THE COURT: All right.

6 MR. ROBBINS: His next issue is that he
7 asserts that the members of the jury were
8 being allowed to question witnesses. At the
9 time, that was your practice to allow that.

10 I think the case law is clear on that,
11 that is permissible for the Court to allow
12 jurors to -- And the jurors' questions were
13 limited to basically the police officers.

14 Okay.

15 The next two issues involve the
16 request -- or the assertion that Mr. Bester
17 says that he's -- that he was denied his
18 right to testify on his own behalf in this
19 case. And that he -- did not receive.
20 Although he did not testify in this case.

21 The Court did not give that requested
22 jury charge that if a defendant does not
23 testify they cannot take -- take any adverse
24 inference from that.

25 And that -- that issue is -- And when

1 we take some testimony, I'm going to ask Mr.
2 Bester to get -- to address that briefly.

3 THE COURT: Was there a request by
4 trial counsel for me to give that
5 instruction?

6 MR. ROBBINS: There was not. There was
7 not. There was not.

8 And as I explained to Mr. Bester, and
9 Mr. Bester has -- has, you know, been
10 up-front with me about this. That he had
11 discussions with his lawyer, Mr. Benson.

12 And Mr. Benson advised him that if he
13 testified, then, he was subject to
14 cross-examination. Furthermore, he was
15 concerned --

16 THE COURT: Concerning his four
17 felonies --

18 MR. ROBBINS: -- he had four prior
19 felony convictions that would come in, as
20 far as impeachment would concern, so.

21 I mean, that certainly goes into
22 consideration of whether the Defendant
23 testified.

24 He also raised --

25 THE COURT: Well, let me ask you this,

1 John. I know that there was no request at
2 trial. Was that issue raised on appeal,
3 also?

4 MR. ROBBINS: Was that issue -- no.
5 No. That issue was not raised on appeal.

6 There was three issues -- There was
7 three issues raised on appeal. And the
8 issues raised on appeal was the first one
9 was sufficiency of the evidence argument.

10 The appellate courts went into great
11 length addressing that issue on appeal. And
12 basically said, although this may have been
13 a circumstantial evidence case, and it was a
14 constructive possession case. And that
15 there may have been some conflicting
16 testimony. That was an issue for the jury
17 to decide. And they upheld on a sufficiency
18 argument.

19 The next two issues that were raised on
20 appeal, the Court ruled were not preserved
21 for appellate review.

22 One -- one issue was, ineffective
23 assistance of trial counsel. The Court is
24 clear that, that was kind of frowned upon
25 that being raised on direct appeal.

1 However, if there is -- you can raise
2 it on direct appeal if it is properly
3 presented to the trial court first and a
4 record is developed at that -- at that point
5 for the appellate courts to address the
6 issue. That was not done in this case.

7 The Court of Criminal Appeals ruled
8 that issue wasn't preserved for appellate
9 review.

10 Furthermore, that the trial court ruled
11 that that issue was not properly presented
12 under the Rules of Appellate Procedure.
13 Where in order to designate an error, you
14 have an error that you say warrants relief.
15 That you have to point at that point,
16 specifically, to the record and offer some
17 authority. Whether it's case law, whether
18 it's statutory law to support your argument.

19 That was not done in this case. So
20 they ruled that issue was not properly
21 preserved.

22 The next issue that was raised on
23 appeal was the sentencing issue. And --

24 THE COURT: Well, let me say this.
25 According to the answer, and I'm going by

1 the State's response --

2 MR. ROBBINS: Sure.

3 THE COURT: B(1) says, the trial
4 Court's denial of Petitioner's request for
5 new trial[sic] which deprived him of his
6 right to counsel of his choice.

7 As I understand it, his objection is
8 that, during the course of the trial he
9 requested new counsel?

10 MR. ROBBINS: He requested new counsel
11 prior to -- prior to the start of the trial.

12 And your ruling was, as you do in every
13 case that I've seen where that's come up.
14 That is not an issue that you -- that you
15 likely grant just, you know, just prior to
16 the picking of a jury.

17 THE COURT: Okay. All right.

18 MR. ROBBINS: Okay.

19 So that issue was brought up prior to
20 the striking of the jury.

21 MR. RIGDON: And Judge, just to add to
22 that. I think his basis -- If you don't
23 mind?

24 MR. ROBBINS: Sure.

25 MR. RIGDON: For requesting new

1 trial[sic] was that he wasn't being
2 represented correctly. He wasn't being
3 represented right.

4 I think Your Honor found that that
5 wasn't a sufficient basis to grant him a new
6 counsel. Especially, I think, it was within
7 a few minutes before the trial began.

8 THE COURT: Right.

9 Okay.

10 B(2) is, trial Court's denial of
11 Petitioner's Motion to Suppress.

12 What does he have to say on that?

13 MR. ROBBINS: Well, Judge, that issue
14 wasn't taken up on appeal. And I looked at
15 the record.

16 The issue, in this case, or the
17 evidence that resulted in his conviction of
18 the trafficking offense, was seized from his
19 mother's apartment. Not his apartment.

20 THE COURT: Uh-huh.

21 MR. ROBBINS: Or not his house.

22 The deputies had a search warrant that
23 -- to search his house. For which there was
24 no contraband seized in that, that was used
25 to -- in this trial.

1 The cocaine that resulted in the
2 trafficking case, was taken from his
3 mother's apartment of which she gave the
4 deputies a consent to search. And she also
5 made some incriminating statements to her
6 son, Mr. Bester.

7 Now, she recanted some of that at
8 trial. Hence, there became the conflict
9 which had to be resolved by the jury.

10 So the Motion to Suppress, even if you
11 entertained -- even if the Court entertained
12 the Motion to Suppress on his house, and
13 challenged the probable cause against the
14 search warrant, he had a standing issue on
15 the actual incriminating evidence. And
16 furthermore, there was a consent -- a
17 written consent to search.

18 THE COURT: All right. And that issue
19 was raised on appeal, and he was denied
20 relief.

21 MR. ROBBINS: Well, the appellate
22 courts did not address that issue. Because
23 it was not --

24 THE COURT: It was not raised.

25 MR. ROBBINS: It was not raised on

1 appeal.

2 THE COURT: Okay.

3 MR. ROBBINS: That issue was not raised
4 on appeal.

5 THE COURT: Okay.

6 All right. Let's go to the next one
7 then.

8 The trial Court abused its discretion
9 in declaring Petitioner a violent offender
10 and sentencing him to life without parole.

11 MR. ROBBINS: Now that is his -- in my
12 opinion, as a lawyer, is his best issue.

13 Because that's his best issue that has,
14 what I believe, some merit.

15 THE COURT: All right. Why is that?

16 MR. ROBBINS: Okay.

17 And that's where I want to focus on, on
18 that issue.

19 He received a life sentence without
20 parole. On the trafficking case.

21 Okay. And the Court has based that on
22 the -- that he had four prior felony
23 convictions at the time he was convicted in
24 this case.

25 THE COURT: He had one prior Class A

1 and he was convicted of a Class A --

2 MR. ROBBINS: No. No. No --

3 THE COURT: Did he not?

4 MR. ROBBINS: He did not have any prior
5 Class A's.

6 He had two Class B felonies. And two
7 Class C felonies.

8 THE COURT: Okay. The two Class B's
9 were: Discharging into a --

10 MR. ROBBINS: They were discharging
11 into an occupied --

12 THE COURT: Dwelling.

13 MR. ROBBINS: Vehicle.

14 THE COURT: Vehicle. Okay.

15 MR. ROBBINS: Vehicle.

16 He pled guilty to those two offenses on
17 February 27th of 2001.

18 THE COURT: Uh-huh.

19 MR. ROBBINS: And as part of a packaged
20 deal, and I think the two marijuana cases
21 were -- were pled a couple months later in
22 May.

23 THE COURT: Okay. Hold on one second.

24 Rigdon, why do you say that he was
25 convicted of a Class A, which I know

1 trafficking is, but he had a prior
2 conviction for a Class A felony in your
3 answer?

4 MR. RIGDON: Judge, is that --

5 THE COURT: On the last page of your
6 response on page 7.

7 MR. RIGDON: Okay.

8 (Whereupon, the Prosecutor is
9 reviewing documents.)

10 THE COURT: And you say, life without
11 parole was mandated under 13A-5-9 --

12 MR. RIGDON: On the last page --

13 THE COURT: Uh-huh. It's the first
14 paragraph.

15 (Whereupon, the Prosecutor is
16 reviewing documents.)

17 MR. RIGDON: Judge, if he was not
18 convicted of a Class A, that would be an
19 error in that motion.

20 THE COURT: All right. Go ahead, John.

21 MR. ROBBINS: Okay.

22 THE COURT: You do have a list of his
23 prior felony convictions; do you not?

24 MR. ROBBINS: Yeah. I mean, I have
25 them. I have them with me right now.

1 They are a part of the -- they are a
2 part of the trial court record. Because
3 they were introduced as exhibits at
4 sentencing.

5 THE COURT: Okay.

6 MR. ROBBINS: Okay.

7 So they're a part of the record.

8 THE COURT: And the other two are for
9 what, John?

10 I know two are for discharging.

11 MR. ROBBINS: And two are for
12 possession of marijuana in the first-degree.

13 THE COURT: Okay.

14 MR. ROBBINS: And all four of them
15 were, basically, packaged into one kind of a
16 deal in which he received a ten year
17 sentence.

18 Okay.

19 And he did time for that ten. He
20 served his ten year sentence. And he EOSed
21 his sentence.

22 THE COURT: Okay.

23 MR. ROBBINS: Okay.

24 Now, so under the law, as it is
25 currently in effect is, the sentence -- On a

1 Class -- once you're convicted of a Class A
2 felony, and you have at least three prior
3 felony convictions without there being an A
4 conviction. The Court has discretion to
5 sentence the Defendant either to life, or
6 life without.

7 It's a discretionary. It's a
8 discretionary issue. And this is tantamount
9 to a Kirby issue.

10 Okay.

11 Where the Court made the changes in the
12 Habitual Offender Law. And made it
13 retroactive. And courts can go back and
14 resentence defendants who either got a life
15 sentence or a life without sentence, if they
16 were sentenced prior to the amendment
17 changing the Habitual Offender Law.

18 And what the courts looked at, and if
19 you look at the whole case, Judge, the Court
20 looked at that, you know, life without, one
21 of those things is he's a violent offender?

22 Is he a violent offender?

23 THE COURT: Well, there's no doubt in
24 my mind that he's a violent offender.

25 MR. ROBBINS: But the courts --

1 THE COURT: Looking at his record.
2 He has two discharging a firearm
3 convictions.

4 And I mean, this is a trafficking
5 conviction where, as I recall the testimony,
6 he was trafficking dope out of his mother's
7 house.

8 He could have gotten his mother killed.
9 And anybody else that was there.

10 So it's no doubt in my mind that this
11 Court views him as a dangerous offender.

12 MR. ROBBINS: Well, and --

13 THE COURT: A violent offender.

14 MR. ROBBINS: And Judge, with all due
15 respect, is the courts have said just
16 labeling somebody a violent offender based
17 upon the name that -- charge is the courts
18 says you need to look further into -- into
19 his background.

20 Just because he has a violent offense,
21 doesn't mean the courts are going to
22 construe that -- him to be a violent
23 offender which would not entitle him to
24 relief.

25 And that's what I mean --

1 THE COURT: Well, I look at the facts
2 of the case that's listed in his presentence
3 report. Dealing with this incident
4 occurring out of his mother's house. And he
5 was dealing probably unbeknownst to his
6 mother.

7 He had a bag containing approximately
8 75 grams of crack and powder cocaine, and a
9 set of digital scales.

10 So there's no -- Plastic baggies.
11 Digital scales. Pyrex measuring cup with
12 cocaine residue.

13 And then, if you look at this -- his
14 history, his sentencing -- I'm sorry. His
15 arrest history.

16 (Whereupon, the Court is reviewing
17 documents.)

18 THE COURT: Not only do you have the
19 offenses that we've talked about, but you
20 have various other dangerous offenses.

21 Such as: Assault first, discharging a
22 gun in an occupied building, attempted
23 murder, shooting into an occupied building.
24 Another attempted murder.

25 All of those things.

1 MR. ROBBINS: Well, and Judge, but the
2 offenses that you just referred to resulted
3 in no convictions. And really no
4 prosecutions.

5 THE COURT: I agree.

6 MR. ROBBINS: They resulted in none of
7 that, okay.

8 But if you look at the -- the two
9 discharging a gun into an occupied vehicle.
10 Those charges date back to 1999.

11 THE COURT: Uh-huh.

12 MR. ROBBINS: They date back to 1999.

13 THE COURT: Okay.

14 MR. ROBBINS: And if you look at the
15 facts of that case, those cases, they're not
16 so egregious that anybody had the -- had a
17 chance of being hurt.

18 THE COURT: All right.

19 State, tell me something about these
20 two shooting into an occupied vehicle cases
21 that he was convicted of.

22 Tell me something about the facts.

23 MR. RIGDON: I don't have any
24 information on the facts of the two priors
25 which are in front of me, Judge.

1 THE COURT: Why?

2 MR. RIGDON: We just looked up what his
3 priors were. And what the current
4 conviction was based on.

5 But, Judge, we have not gone back and
6 looked into the information on the actual
7 priors.

8 THE COURT: All right.

9 MR. RIGDON: I know what charge they
10 were.

11 THE COURT: All right. You can
12 continue, John.

13 MR. ROBBINS: Judge --

14 THE COURT: All right. So you want to
15 offer some testimony --

16 MR. ROBBINS: Yeah. I was gonna -- I
17 wanted to talk about that --

18 THE COURT: All right.

19 Yeah, let's go to testimony. Then hear
20 what arguments y'all have.

21 MR. ROBBINS: Okay.

22 DURRELL BESTER,

23 A witness on his own behalf,
24 Having already been duly sworn by the Court,

25 Testified as follows:

DIRECT EXAMINATION

BY MR. ROBBINS:

Q. Would you state your name for the record?

A. Durrell Bester.

Q. All right. Mr. Bester, how old are you?

A. [REDACTED]

Q. Okay. And you are currently serving a life without sentence, correct?

A. Yes.

Q. Okay. Now, going back to 19 -- 1999.

How old were you when you were arrested on those two offenses where you pled guilty to discharging a firearm into an occupied vehicle?

A. I was [REDACTED].

Q. You were [REDACTED] at the time.

Okay. At that time, were you in school?

A. Yes.

Q. Okay. What school were you attending?

A. Jess Lenier.

Q. Okay. And what grade were you in?

A. I was in the [REDACTED]

Q. Okay. Were you in any special-ed classes?

A. Yes.

Q. Okay. What type of special-ed classes were you in?

1 A. I can't really remember. Too many of 'em.

2 Q. Okay. Were you -- were you, at that time,
3 diagnosed with a mental illness?

4 A. Yes.

5 Q. Okay. What is that mental illness?

6 A. Paranoid schizophrenic and depression, and a
7 couple more other things.

8 Q. At that time, were you being treated for --

9 A. Yes.

10 Q. Okay. Where were you being treated?

11 A. Western Mental Health Center.

12 Q. Okay. How long -- Do you remember when you
13 were first diagnosed with these illnesses?

14 A. I know I was a kid.

15 Q. Okay. And were you receiving any monthly
16 compensations -- disability compensation?

17 A. Yes.

18 Q. Okay. How long have you been on disability?

19 A. Since I was a kid.

20 Q. Okay. And the incident -- the first
21 incident involving discharging a firearm into an
22 occupied vehicle. Can you tell the Court about
23 that incident? What led up to that incident?

24 A. A dude had jumped on my sister.

25 Q. What's your sister's name?

1 A. Latasha Conwell.

2 Q. Okay. And how old was she?

3 A. She was probably about .

4 Q. Okay. And do you remember -- you say "the
5 dude", but do you remember this person's name?

6 A. Uh-huh.

7 Q. Okay.

8 A. I remember his name.

9 Q. What is his name?

10 A. Ronald Jackson.

11 Q. Okay. And what did you do as a result of
12 Ronald Jackson, when you say "jumping" on your
13 sister?

14 A. I had seen his car. It was. I asked her
15 what kind of car it was, and I seen the car parked,
16 and I just shot the car.

17 Q. Okay. Why did you shoot the car?

18 A. I was mad.

19 Q. Okay. Was anybody in the car, at the time?

20 A. No.

21 Q. Okay. Did you attempt to tell your lawyer
22 then about that?

23 A. Yes.

24 Q. Okay. Do you remember who your lawyer was?

25 A. Jeff Hood.

1 Q. Okay. And you told Mr. Hood that you shot
2 the vehicle, but it was not occupied?

3 A. Yes.

4 Q. Okay.

5 Now, the other charge, shooting into an
6 occupied vehicle, that you pled guilty to on
7 February 27th, 2001. Do you know any of the facts
8 of that case?

9 A. Not really. But I just know I was charged
10 with it. And I just took the deal because my
11 lawyer told me it was the best deal for me to get.

12 Because he told me if I was found guilty on
13 one, I was going to be guilty on all of them. So.

14 Q. Okay. So this second offense, are you
15 saying you did that?

16 A. No, I ain't do that.

17 Q. Okay. But you pled guilty to it because it
18 was a packaged deal?

19 A. Yes.

20 Q. Okay. That you were afraid of being
21 convicted?

22 A. Uh-huh.

23 Q. And getting more than ten years?

24 A. Yes.

25 Q. Okay.

1 Now, once -- Did you do -- did you go to
2 prison? Did you actually go to prison on those
3 cases --

4 A. Yes. Yes, I did.

5 Q. You received what kind of sentence?

6 A. A ten year sentence.

7 Q. Okay. Do you remember what prison you went
8 to?

9 A. Bullock.

10 I stayed at Bullock for two and a half
11 years. And I went to Elmore for eight months, and
12 went to work release.

13 Q. Okay.

14 THE COURT: Now, let me make sure I
15 understand something.

16 Both of the discharging cases occurred
17 relatively close in time, and he pled guilty
18 on both cases, and received a packaged deal
19 of ten years "cc" in each case?

20 MR. ROBBINS: Yes.

21 THE COURT: Is that correct?

22 MR. ROBBINS: Okay --

23 THE COURT: Both sides agree on that?

24 MR. ROBBINS: One of the offenses --
25 They both go back to 1999, Judge. And I

1 believe one alleges -- was February 12th of
2 1999.

3 (Whereupon, defense counsel is
4 reviewing documents.)

5 MR. ROBBINS: And the other one, I
6 believe is --

7 THE COURT: It says February 22nd[sic],
8 '01.

9 MR. ROBBINS: That's when they pled
10 guilty.

11 THE COURT: Okay.

12 MR. ROBBINS: That's when he pled
13 guilty. February 27th of '01. He pled
14 guilty.

15 The date of the offense would be,
16 referring to the first one, it was February
17 of '99. And the other one, I believe, is
18 May 16th of 1999.

19 THE COURT: Okay.

20 MR. ROBBINS: It's in close proximity
21 in months. But they were resolved as a
22 packaged deal.

23 THE COURT: Okay.

24 MR. ROBBINS: In February of 2001, also
25 with those marijuana -- those marijuana

1 cases.

2 THE COURT: Well, it bothers me that he
3 doesn't remember the case involving him
4 shooting into an occupied vehicle.

5 I mean, that's something that you don't
6 forget. When you shoot into an occupied
7 vehicle.

8 MR. ROBBINS: Well --

9 THE COURT: And I'm just saying. You
10 know, you don't have to address it at all.
11 I'm just telling you that.

12 MR. ROBBINS: He remembers one.

13 THE COURT: Well, I understand he
14 remembers the one where nobody's in the car.
15 But then he's telling me he doesn't remember
16 the one where somebody is in the car?

17 MR. ROBBINS: Well, he remembers the
18 one that he did.

19 What he's saying is, the other one he
20 didn't do. Has no memory of that. But
21 accepted it because it was a package --

22 THE COURT: Okay.

23 All right. Move along.

24 BY MR. ROBBINS:

25 Q. Okay. And while you were -- You first went

1 to Bullock?

2 A. Uh-huh.

3 Q. Correct?

4 A. Yes.

5 Q. Okay. Did you complete any programs --

6 A. Yes.

7 Q. -- while you were at Bullock?

8 Please tell the Court what programs you
9 completed.

10 A. Anger management. And SAP Program.

11 Q. Okay. Did you successfully complete them?

12 A. Yes.

13 Q. Okay. Now, while you were at Bullock did
14 you receive any disciplinaries?

15 A. No.

16 Q. Okay. So at Bullock you had a clean prison
17 record?

18 A. Yes.

19 Q. Okay. You went from Bullock to where?

20 A. Elmore.

21 Q. Okay. At Elmore did you complete any
22 programs?

23 A. They ain't have no programs. It's an honor
24 camp, a work camp.

25 Q. It's an honor work camp?

1 A. Uh-huh.

2 Q. Okay. While you were at Elmore, did you
3 receive any disciplinaries?

4 A. No.

5 Q. Okay. Did you have any -- Did you have a
6 clean prison record there?

7 A. Yes.

8 Q. Okay. After you -- you went from Elmore to
9 work release?

10 A. Yes.

11 Q. Where was the work release?

12 A. Bullock.

13 Q. Okay. You went back to Bullock Work
14 Release?

15 A. Yes. There's a work release across from the
16 prison.

17 Q. Okay. And did you have a job?

18 A. Yes.

19 Q. Okay. Where were you working?

20 A. In Troy, Alabama. HB&G.

21 Q. Okay. Doing what?

22 A. Boxing columns.

23 Q. Okay. And how long did you have that job?

24 A. About three months.

25 Q. Okay. And did you -- And that's working in

1 the free world?

2 A. Yes.

3 Q. Did you have any disciplinary while you were
4 on work release?

5 A. Nope.

6 Q. Get written up for anything while you were
7 on --

8 A. No.

9 Q. Okay. And that sentence, were you paroled
10 or did you EOS your sentence --

11 A. I EOSed.

12 Q. Okay. When you EOSed your sentence, where
13 did you go?

14 A. I went home.

15 Q. And where is home?

16 A. Birmingham. With my mom.

17 Q. And when you got back -- you got back to
18 Birmingham in what year?

19 A. 2004.

20 Q. When you got back to Birmingham, were you
21 able to get a job?

22 A. No. Not for real. I tried. I got one
23 little job with Sterilite for a minute.

24 Q. Okay. Doing what?

25 A. Different little things. Basically, just

1 working with plastic and stuff.

2 Q. Okay. And how long did you have that job?

3 A. I had it for a couple weeks.

4 Q. Okay. And what happened to that job?

5 A. I ended up losing it.

6 Q. Okay. Do you know why?

7 A. I couldn't have a ride to take me to work
8 and, you know, got there properly.

9 Q. Okay. So you had transportation problems?

10 A. Yes.

11 Q. Did you have a driver's license?

12 THE COURT: I don't care about all of
13 that --

14 MR. RIGDON: Judge, I'm going to object
15 to relevance --

16 THE COURT: -- Let's talk about
17 something important.

18 MR. RIGDON: -- to this line of --

19 THE COURT: Well, you should have been
20 objecting.

21 Let's get to something that's material
22 to the issue before me.

23 MR. ROBBINS: Judge, I think this is
24 important, understanding his background.

25 Understanding his background.

1 THE COURT: John, get to something
2 that's relevant to the issue before me.

3 (Brief pause.)

4 BY MR. ROBBINS:

5 Q. From the time you were released from prison
6 until being arrested on this offense, had you been
7 charged with any felony offenses?

8 A. No.

9 Q. Okay.

10 THE COURT: All right. Anything else?

11 (Pause.)

12 MR. ROBBINS: No, Judge, not on this
13 issue.

14 THE COURT: All right. Cross?

15 CROSS-EXAMINATION

16 BY MR. RIGDON:

17 Q. Mr. Bester, I'm going to go back to this
18 first firing incident back in, you say 1999?

19 A. Uh-huh.

20 Q. Now, tell me what you recall about what
21 created that. What caused that?

22 A. What caused it?

23 Q. Yeah. What lead to that?

24 A. Which one you talking about?

25 Q. The first one.

- 1 A. My sister had got jumped on.
- 2 Q. Your sister had been jumped on?
- 3 A. Uh-huh.
- 4 Q. Do you know who jumped on her?
- 5 A. Beat up?
- 6 Q. Who did that?
- 7 A. A dude named Ronald.
- 8 Q. Okay. Well, when did that happen?
- 9 A. That was in '98.
- 10 Q. Okay. Do you know what day it was?
- 11 A. I can't remember exactly what day it was.
- 12 Q. Okay. Now, what did you do after that?
- 13 A. She described the car to me. And I just seen
- 14 where the car was. And I went over there and I
- 15 shot the car.
- 16 Q. Did she call you up?
- 17 A. Did she call me up?
- 18 Q. Did she call you and tell you she had been
- 19 jumped on?
- 20 A. No, I had seen her.
- 21 Q. You were there, and you saw it?
- 22 A. Naw. I seen her.
- 23 Q. You saw her?
- 24 A. Yeah.
- 25 Q. And she told you what the car looked like?

1 A. Yep.

2 Q. And then what did you do?

3 A. I went over there where the car was. And the
4 car was parked, and I shot at it.

5 Q. With your gun?

6 A. Yes.

7 Q. How close in proximity in time between when
8 she told you and when you went over there did that
9 occur?

10 A. It was probably like, for real, like about a
11 day or two later.

12 Q. A day or two later, you walked -- you went
13 over to that person's house?

14 A. Yeah.

15 Q. And you just got your gun and fired into
16 that car?

17 A. Yes.

18 Q. And nobody was in the car, you're saying?

19 A. Nobody was in the car.

20 Q. And I'm guessing you were arrested
21 thereafter?

22 A. Yes.

23 Q. And charged with firing into an occupied
24 vehicle?

25 A. Yes.

1 Q. And you pled guilty to firing into an
2 occupied vehicle?

3 A. Yes.

4 Q. Although you're saying it was not occupied?

5 A. Huh?

6 Q. You're saying it was not occupied?

7 A. The vehicle?

8 Naw, it wasn't occupied.

9 Q. Okay. And you were charged a second time
10 for an incident which occurred two years later?

11 A. Uh-huh.

12 Q. Okay. What happened in that --

13 MR. ROBBINS: Judge, we object, that
14 he's getting confused. It wasn't two years
15 later. It was a couple months later.
16 According to -- according to the court
17 record on that offense, it was a couple
18 months later.

19 MR. RIGDON: I thought I --

20 THE COURT: Well, I have one that's
21 2/12/99 and one that's 5/16/99.

22 MR. RIGDON: Okay.

23 THE COURT: Three months later --

24 MR. RIGDON: I apologize. I may have
25 misunderstood.

1 BY MR. RIGDON:

2 Q. You were charged for an incident which
3 occurred several months following the first
4 incident?

5 A. Yes.

6 Q. Okay. And what was that a result of?

7 A. All I know was that I was charged with
8 shooting a occupied dwelling.

9 Q. An occupied dwelling?

10 A. Yes.

11 Q. Not a vehicle, but a dwelling?

12 A. Uh-huh.

13 Q. And you have, as I understand it, you have
14 no recollection of why the charges were brought?

15 A. No, I did not.

16 Q. So you've never fired a gun into an occupied
17 dwelling?

18 A. No.

19 Q. Never done it?

20 A. (No response.)

21 Q. Yet you were charged?

22 A. Yes.

23 Q. And you agreed that you did it?

24 A. (No response.)

25 Q. You pled guilty?

1 A. Yeah, I did the first one. But I don't know
2 where the second one come from.

3 Q. Did you ever ask anybody that arrested you,
4 why have I been arrested for shooting into a
5 house?

6 A. Yes.

7 Q. What'd they tell you?

8 A. They was telling me a girl had said I shot in
9 her house or something.

10 Q. You said a girl had shot into your house?

11 A. Naw. Said I shot into her house.

12 Q. Okay. A girl -- Do you know what girl?

13 A. Shanta. I don't even know her name. Shanta
14 or something.

15 Q. Had said that you shot into her house?

16 A. Uh-huh.

17 Q. Okay. And so you pled guilty to shooting a
18 firearm into an occupied dwelling?

19 A. Uh-huh.

20 MR. ROBBINS: Judge, we object to that.
21 That's not what he pled guilty to.

22 THE COURT: Well, John you can offer
23 the --

24 MR. ROBBINS: Well, it's part of the
25 record --

1 THE COURT: -- record.

2 MR. ROBBINS: I mean, it's part of the
3 record on page --

4 THE COURT: It's not.

5 It hadn't been admitted into evidence
6 in this hearing.

7 MR. ROBBINS: Sure.

8 THE COURT: So if you wish to offer it
9 after Prosecutor --

10 MR. ROBBINS: Sure. And I don't mean
11 to interrupt.

12 THE COURT: -- finishes, you can.

13 (Brief pause.)

14 BY MR. RIGDON:

15 Q. So let me make sure I'm clear on this.

16 This happened a few months after the firing
17 incident into a vehicle; is that correct?

18 A. Yes.

19 Q. And you're arrested -- What you were told by
20 an officer, is that you were arrested for firing a
21 gun into a house?

22 A. Yeah.

23 Q. An occupied house?

24 A. Uh-huh.

25 Q. And what was that girl's name?

1 A. Shanta.

2 Q. Okay. And you have no recollection of that?

3 A. No.

4 Q. Okay.

5 (Brief pause.)

6 THE COURT: Did you stand in front of a
7 judge and admit to shooting into this
8 Shanta's house?

9 THE DEFENDANT: No.

10 THE COURT: Didn't you plead guilty to
11 the incident?

12 THE DEFENDANT: Yes. I plead guilty to
13 the time that they gave me. They told me
14 they was going to run everything.

15 THE COURT: Well, we don't just give
16 folks time.

17 You have to stand in front of the
18 judge, and the prosecutor have to tell the
19 judge what the facts would be in the case.

20 And then the judge asks you, is that
21 what you did.

22 And if you -- you must say "yes, sir"
23 for him to continue with taking your plea.

24 If you say "no, sir", the judge won't
25 take your plea.

1 And so I'm asking you, did you stand in
2 front of a judge and admit to shooting into
3 that lady's house; the Shanta lady.

4 THE DEFENDANT: No, I did not.

5 THE COURT: All right. Go ahead.

6 MR. RIGDON: Okay.

7 (Pause.)

8 MR. RIGDON: Judge, as far as the
9 original line of questioning, pertaining
10 mainly to his work history, his prison
11 history and his sentencing.

12 He hasn't gone into any other issues.
13 So as far as my cross-examination, I'm going
14 to stop here unless --

15 THE COURT: All right.

16 MR. RIGDON: -- he intends to go into
17 other issues.

18 THE COURT: All right. That'll be
19 fine.

20 All right. You got any other issues
21 you want to present something on?

22 MR. ROBBINS: Judge, I want to --

23 THE COURT: You want to offer those two
24 priors?

25 MR. ROBBINS: These are the two

1 priors --

2 THE COURT: Okay. Offer them as --

3 MR. ROBBINS: Or actually --

4 THE COURT: -- Petitioner's Exhibits.

5 MR. ROBBINS: I'm going to admit all
6 four. These are in the trial record.

7 THE COURT: All right.

8 We'll mark those as Petitioner's
9 Exhibits 1, 2, 3, and 4.

10 (Whereupon, Petitioner's Exhibit
11 Numbers 1, 2, 3 and 4 were marked
12 for identification.)

13 THE COURT: And they are admitted in
14 this hearing.

15 (Whereupon, Petitioner's Exhibit
16 Numbers 1, 2, 3 and 4 were
17 received into evidence.)

18 REDIRECT EXAMINATION

19 BY MR. ROBBINS:

20 Q. Durrell --

21 MR. ROBBINS: And Your Honor, if you
22 can just give me a little leeway just so we
23 can get just develop a brief record on his
24 one issue that he raised, that was not even
25 taken up on direct appeal.

1 Q. You put in your Petition, that you were
2 denied the right to testify; is that true?

3 A. Yes.

4 Q. Okay. Did you have a discussion with your
5 lawyer about that?

6 A. Yes.

7 Q. Okay. Do you recall what was -- what the
8 discussions were?

9 A. I was asking him about why he was letting me
10 know at the last minute that he waived for the
11 search warrant or something.

12 He ain't let me know that. That they going
13 to trial. And all this time I had been asking him.

14 Q. Okay. Now, is -- you put in your --
15 Durrell, you put in your Petition that you wanted
16 to testify?

17 A. Yes.

18 Q. Okay. And that you weren't -- yet you
19 weren't called as a witness?

20 A. Yes.

21 Q. Okay. Did you have a discussion with your
22 lawyer about you testifying at trial?

23 A. Yes.

24 Q. Okay. Could you tell us about that
25 discussion?

1 A. I was asking him about me testifying. And he
2 told me, it wouldn't be a good idea or something.

3 He was like, everybody will know of your
4 prior convictions and things like that. So.

5 Q. Did you understand what he meant by that?

6 A. Yes.

7 Q. Okay. Tell me what your understanding was.

8 A. I guess he was saying like they gonna bring
9 up my history or something. If I get on the stand.

10 Q. Okay. And after you had that discussion,
11 okay -- Excuse me, before we go on.

12 Your history, was that made clear to you,
13 talking about your felony, prior felony
14 convictions?

15 A. Yes.

16 Q. Okay.

17 Did your lawyer tell you that if you
18 testified that the prosecution could bring out the
19 fact that you've been previously convicted four
20 times of a felony conviction?

21 A. Yes.

22 Q. Okay. So after you had that discussion, did
23 you -- did you request to testify?

24 A. Yes.

25 Q. You still wanted to testify?

1 A. Yes. I did.

2 Q. Okay. And did you tell your lawyer that?

3 A. Yes.

4 Q. Okay. And what was your lawyer's response?

5 A. The same thing.

6 He told me that it wouldn't be a good idea.

7 (Brief pause.)

8 Q. Okay. Did you attempt to bring it to the
9 Court's attention that you wanted to testify?

10 A. Whatcha mean like?

11 Q. Well, did you tell the Judge?

12 A. No --

13 Q. That you wanted to testify?

14 A. No, I didn't.

15 (Brief pause.)

16 MR. ROBBINS: I don't have anything
17 else, Your Honor.

18 THE COURT: State?

19 RECROSS-EXAMINATION

20 BY MR. RIGDON:

21 Q. Mr. Bester, is it fair to say that your
22 attorney advised you that you have the right to
23 testify on your own behalf?

24 A. No.

25 Q. He never told you, you had the right?

1 A. Nope.

2 Q. Did you ever ask him if you could testify?

3 A. I just asked him that, you know. Yeah --

4 Q. And his response was, that it would not be
5 in your best interest --

6 A. Yes.

7 Q. -- is that correct?

8 A. Yes.

9 Q. Do you believe he was looking after your
10 best interest?

11 A. Yes. That what I felt like.

12 Q. Okay. And he told you, as I understand what
13 you've said, that if you were to testify, then
14 your four prior convictions come into evidence?

15 A. Yes.

16 Q. And the jury hears about those?

17 A. Yes.

18 Q. And that wouldn't look good, would it?

19 A. Yes.

20 Q. Okay. So he was looking after your best
21 interest?

22 A. That's what I thought he was doing.

23 Q. Okay. And y'all had that conversation?

24 A. Yes.

25 Q. Okay. And just as I understand it, you

1 never told the Court, or advised the Court, that
2 you wanted to testify and you were not being
3 allowed to do so; is that correct?

4 A. No, I ain't never say nothing to the Judge or
5 nothing like that. I just said it to him.

6 Q. Okay.

7 A. You know, because I'm thinking he's my best
8 interest, you know.

9 Q. Okay.

10 MR. RIGDON: I have no additional
11 questions, Judge.

12 MR. ROBBINS: I have nothing further on
13 that issue.

14 THE COURT: All right, Mr. Bester, you
15 can step down.

16 (Whereupon, the Defendant
17 complies.)

18 THE COURT: All right. You rest?

19 MR. ROBBINS: Your Honor, yes.

20 THE COURT: All right. Call your
21 witness.

22 MR. RIGDON: The State calls Billy
23 Benson.

24 THE COURT: All right. Attorney Billy
25 Benson.

1 (Whereupon, the witness was
2 brought to the witness stand.)

3 THE COURT: All right. You're a Court
4 Officer.

5 You may proceed, Brady.

6 WILLIAM HOWARD BENSON, III, Esq.

7 A witness for the State,
8 Having already been duly sworn by the Court,
9 Testified as follows:

10 DIRECT EXAMINATION

11 BY MR. RIGDON:

12 Q. Mr. Benson, would you please state your full
13 name for the record?

14 A. It's William Howard Benson, III.

15 Q. Are you currently licensed to practice law
16 in Alabama?

17 A. I am.

18 Q. Okay. Do you recall representing Mr.
19 Durrell Bester?

20 A. I do.

21 Q. Okay. Do you know when that occurred?

22 A. It's been a couple of years.

23 Q. Okay. What kind of case was that?

24 A. It was a trafficking cocaine. I believe
25 there was a paraphernalia charge.

1 Q. Were you appointed or were you hired by him
2 or his family?

3 A. I was appointed.

4 Q. Okay. Now, there's been an issue in a Rule
5 32, I think you're aware of, that he's alleged
6 something to do with not being able or permitted
7 to testify on his own behalf at trial; do you
8 recall that?

9 A. As that being the issue?

10 Q. Right.

11 A. Yes.

12 Q. Do you recall him asking you if he can
13 testify at trial?

14 A. Yes, I do.

15 Q. Okay. When did he ask you that?

16 A. Well, I mean, we had discussions prior to
17 trial and during the trial.

18 And after his mother testified, we asked the
19 Court for a moment to discuss that option.

20 Q. So this conversation occurred on numerous --
21 numerous times?

22 A. Yes.

23 Q. Okay. Prior to trial?

24 A. During trial and prior --

25 Q. During trial, okay.

1 Did you advise him he had the right to
2 testify?

3 A. Yes.

4 Q. What was his response, during trial, when
5 y'all had that discussion?

6 A. Well, initially, he stated that he wanted to
7 testify. And I, again, pointed out to him, you
8 know, you have four prior felonies that the jury
9 will hear if you are to testify.

10 Q. Okay.

11 A. I would advise you, you know, strongly not to
12 do so.

13 But, as I do with any of my clients, it is
14 your trial, if that's what you want to do, the law
15 certainly permits you to do so. But it would be
16 against my advice.

17 Q. Do you recall his response?

18 A. He thought about it for a moment, and then
19 said, okay I'll just, you know, you're my attorney
20 I'll do what you --

21 Q. Okay.

22 A. Now, that's not a quote.

23 Q. Right. But basically he took your advice?

24 A. Correct.

25 Q. Do you recall him ever bringing it to the

1 Court's attention that he wanted to testify and
2 you weren't letting him testify?

3 A. No.

4 Q. Okay.

5 (Brief pause.)

6 MR. RIGDON: I have no additional
7 questions, Judge.

8 THE COURT: All right, Brady.
9 John?

10 CROSS-EXAMINATION

11 BY MR. ROBBINS:

12 Q. Mr. Benson, were you aware that Durrell had
13 some mental issues?

14 A. At this time, I don't. It sounds vaguely
15 familiar. But I don't have any direct recollection
16 of that.

17 Q. You're -- with your interaction with him,
18 were -- is it your impression that he was a slow
19 learner --

20 MR. RIGDON: Judge, I'm going to object
21 to the relevancy.

22 THE COURT: Well, John, I don't know
23 how this proceeding could really --

24 MR. ROBBINS: Judge, I'll --

25 THE COURT: -- it appears to be outside

1 of the four corners of the Petition.

2 MR. ROBBINS: I'll withdraw that
3 question.

4 THE COURT: Sustain the objection.

5 MR. ROBBINS: I have no further
6 questions on this issue.

7 THE COURT: All right, Mr. Benson, you
8 can step down.

9 (Whereupon, the witness complies.)

10 THE COURT: All right. Anything else
11 for the State?

12 MR. RIGDON: I have no further
13 witnesses, Judge --

14 THE COURT: Anything else for the
15 Petitioner?

16 MR. ROBBINS: No, Your Honor.

17 Except, I would -- I would request that
18 -- an opportunity to brief this issue to you
19 on the sentencing issue. So the Court
20 understands the argument that I'm trying to
21 make.

22 Which I believe is Mr. Bester's best
23 issue is the serving the life without
24 sentence under the facts of this case.
25 Which is, I think that that sentence is

1 extreme. And you know; a life sentence
2 would be more appropriate under the facts of
3 this case.

4 There's people who have killed other
5 people that have gotten less sentences. I'm
6 not minimizing the seriousness of drug
7 trafficking. I'm not.

8 But a life sentence is no cakewalk
9 either. I mean, that's a serious -- it's a
10 serious sentence in which people do serious,
11 serious time.

12 He -- I know his record looks bad.
13 But, you know, the true facts of those other
14 cases really -- don't really come to the
15 level that he's just a violent offender that
16 needs to be taken off the streets forever.

17 Even a life sentence right now, Judge,
18 even a life sentence he'd served -- he's
19 going to serve 20, 25 years. On a life
20 sentence.

21 And, you know, that is a substantial
22 sentence. But at least gives him hope. It
23 gives his family hope. It gives his
24 children some hope that, you know, one day
25 he can return to society. And you know,

1 live out what years he has left in a
2 productive manner.

3 And I'm just saying, there are
4 murderers that get less time. And I'm not
5 minimizing anything that relates to drug
6 trafficking. But a life without sentence is
7 really harsh under these facts. And the
8 Court had an opportunity, and has an
9 opportunity, I believe, to change his
10 sentence simply to a life sentence.

11 He doesn't get out. He doesn't get out
12 of prison. He doesn't. He goes to prison
13 for a long time. But at least gives him
14 hope.

15 THE COURT: State?

16 MR. RIGDON: Judge, I think it just
17 goes back to the Court's discretion as far
18 as sentencing. This issue was raised on
19 appeal. And based on that alone, I think
20 this needs to be denied.

21 It was raised on appeal. The issues of
22 ineffective assistance were raised on
23 appeal. Based on a Rule 32. They can't be
24 raised in a subsequent Rule 32 Petition.

25 And Judge, as far as the previous

1 incidences, these were Bessemer cases. And
2 I apologize again for not having more
3 information. But I just -- I wish I could
4 speak more eloquently on what those two
5 shootings involved. We just didn't -- we
6 didn't go get those Bessemer cases.

7 But, as the Court says, he's a violent
8 offender and he pled guilty to two
9 incidences of shooting into an occupied
10 vehicle. There was discussion of possibly
11 shooting into a residence.

12 So Judge, you know, based on those
13 prior incidences, I think the Rule 32 should
14 be denied.

15 MR. ROBBINS: And Judge, if I may, just
16 briefly?

17 On the sentencing issue, the sentencing
18 issue was not properly presented to the
19 appellate courts. That is why the appellate
20 courts did not address it -- it wasn't
21 properly presented to the appellate courts.

22 The issue was really, to make an
23 argument under a discretionary statute,
24 would also make any arguments in reference
25 to how the courts look at Kirby motions, in

1 an analogous way. By analogy, that is the
2 proper way to present it. And it was never
3 presented.

4 There was not even any case law cited
5 to the courts -- to the appellate courts on
6 why this sentence was -- would have been --
7 the argument would have been an abuse of
8 discretion.

9 There was no -- there was no case law.
10 There was no, you know, legal argument made.
11 It was simply, hey, we don't like -- you
12 know, this sentence is, you know, is
13 extreme. It should be overturned.

14 And the appellate courts just said,
15 look, that's not a proper way to put this
16 issue before the court.

17 THE COURT: Well, why is it before me
18 that way? This way, if this is an improper
19 way?

20 MR. ROBBINS: Well --

21 THE COURT: I mean, why am I not
22 looking at a Kirby Motion?

23 MR. ROBBINS: Well, because -- because,
24 well it --

25 THE COURT: I mean, you know that's the

1 proper way.

2 MR. ROBBINS: Well, the Kirby Motion
3 said that if you're sentenced -- if you're
4 sentenced -- Kirby Motions are supposed to
5 apply, by case law, to all sentencing on a
6 retroactive aspect. People who are
7 sentenced prior to the amendment that gave
8 rise to the Kirby issue.

9 But, by --

10 THE COURT: So you're saying his came
11 afterward --

12 MR. ROBBINS: He came afterwards.

13 So by analogy, is what I'm saying -- is
14 what I'm asking the Court is.

15 Well, we look at, you know, the courts
16 look at Kirby issues, to -- on this --
17 whether you're a violent offender, that when
18 you are put in a position that this Court is
19 -- when deciding between life and life
20 without, is to look at it as a Kirby -- like
21 a Kirby Motion. And not just what the
22 offense is. But, you know, can look at his
23 prison record. You can look at other
24 factors.

25 THE COURT: All right.

1 Let me see the lawyers in chambers.

2 (Whereupon, an off the record
3 discussion was held in chambers.)

4 (Whereupon, the Court and all
5 counsel returned back to the
6 courtroom where the following was
7 heard in open court with the
8 Defendant and all counsel
9 present.)

10 THE COURT: Okay. Let's come back in a
11 week.

12 But I am concerned about the severity
13 of the punishment, on one hand in this case.
14 Where as, on the other hand, he may be
15 deserving of it. Because I am not impressed
16 with his record in no way, shape, form or
17 fashion.

18 And I definitely have not made up my
19 mind as to what I should do.

20 (Brief pause.)

21 THE COURT: All right. Let's continue
22 this until -- Today is the 13th?

23 Friday, Alex?

24 Do we got a docket Friday, Neil?

25 THE BAILIFF: We do, Your Honor.

1 THE COURT: All right. That will be
2 June -- Is that enough time, guys? Friday

3 --

4 MR. RIGDON: I believe so, Judge.

5 THE COURT: Or you want me to do it to
6 Monday? Let's do it to Monday.

7 MR. RIGDON: Okay.

8 THE COURT: That will be June 20th --

9 MR. ROBBINS: Judge, can we do it
10 Friday?

11 THE COURT: That's better for you?

12 MR. ROBBINS: Yeah --

13 THE COURT: Okay. We'll do it Friday.
14 June 17th.

15 Okay. And are y'all gonna give me
16 something or were y'all just going to look
17 at the sentence hearing?

18 MR. RIGDON: Whatever you want us to
19 do, Judge.

20 THE COURT: Well, I'll say this. You
21 can do whatever you deem appropriate.

22 MR. RIGDON: Okay.

23 THE COURT: So if you want to write a
24 memo, a memorandum, a short, like, two,
25 three page memorandum, that's fine. If you

1 don't, that's fine.

2 MR. RIGDON: Okay.

3 THE COURT: Okay?

4 But, if you do, let me have it before
5 Friday. So I'll have a chance to read it.

6 Okay?

7 MR. RIGDON: Just to be clear, Judge,
8 we're going to write something or submit
9 something based on what his priors were?

10 THE COURT: Exactly.

11 MR. RIGDON: Okay.

12 THE COURT: And what the proper
13 sentence should be as, life or life without
14 parole, in this case.

15 MR. RIGDON: Okay.

16 THE COURT: That's what I'm interested
17 in. All of his other --

18 And this is on the record.

19 All of the Defendant's other grounds
20 the Court finds are without merit.

21 The failure to administer the oath to
22 the jury. I find that the record is clear
23 that the Court instructed the jury as to the
24 oath when they appeared here in open court.

25 Additionally, in Jefferson County, the

1 Court Administrator gives the entire jury
2 pool the Oath of Office when they come in on
3 Monday mornings at 9 a.m.

4 The second issue regarding failure to
5 request a mistrial regarding the alternate
6 juror making some statements.

7 The Court finds that that issue is
8 without merit. That there was no harm done.
9 Or the Defendant prejudiced in any manner.
10 Due to the fact that that juror did not
11 actually sit on the jury.

12 The third issue regarding a failure to
13 object to the Court allowing the jurors to
14 ask questions.

15 The Court finds that that issue is
16 without merit. That issue has gone up to
17 the appellate courts in the State of Alabama
18 on several occasions. And the appellate
19 courts have ruled that I do have the
20 authority to allow jurors to ask questions
21 in cases. So that issue is without merit.

22 The next, fourth issue, regarding the
23 Defendant being denied the right to testify.

24 The Court heard the Defendant's
25 testimony that he requested his attorney,

1 Mr. Benson, to allow him to testify. That
2 they both agreed that there was some
3 discussion about it.

4 They both agreed that Mr. Benson
5 discussed the fact that if he testified on
6 the witness stand, that the State would
7 cross-examine him as to his four prior
8 convictions. Which would basically make him
9 look like a habitual criminal to the jury.
10 And after that discussion, Mr. Benson
11 stated, and I believe him, that the
12 Defendant said that, well, I'm going to take
13 your advice and not testify. So the Court
14 finds that that issue is without merit.

15 There is another similar issue raised,
16 the fifth issue, in that it is alleged that
17 trial counsel failed to request or object to
18 the Court not giving a jury instruction on
19 the Petitioner's failure to testify.

20 There was no request made to the Court
21 to give that instruction. And therefore,
22 the Court did not have an opportunity to
23 rule on that issue. And therefore, the
24 Court finds that that issue is without merit
25 also.

1 The second set of issues, that I call
2 "Issue B".

3 The first issue regarding ineffective
4 assistance of counsel alleges that on the
5 day of trial, as I understand it, the
6 Defendant indicated that he was desirous of
7 hiring other counsel.

8 This Court has never allowed defendants
9 to put off trials on the day of trial, based
10 upon that allegation alone.

11 Additionally, there was nothing
12 presented to the Court sufficient, in the
13 Court's mind, to continue the case to
14 another date. And the Court felt that said
15 request was simply a dilatory action, and
16 designed to simply put off the trial of the
17 case. Accordingly, that issue has no merit.

18 B(2), would be the trial Court's denial
19 of Petitioner's Motion to Suppress.

20 The Court notes that that issue was not
21 raised on appeal. And the Court made its
22 decision at the time.

23 And I think there was probably a
24 pretrial motion to suppress that was made in
25 that case.

1 Does anyone know? If it was made
2 during the trial or a pretrial?

3 MR. ANDERTON: It probably was a
4 pretrial?

5 THE COURT: Probably was pretrial, I
6 would think.

7 And the Court having reviewed the facts
8 of this trafficking case deems that the
9 Motion to Suppress -- the denial of the
10 Motion to Suppress was the proper decision
11 in that case, according to that issue. And
12 relief is denied on that ground.

13 The remaining issue is the issue
14 regarding the proper sentence for this
15 Defendant. And the Court is going to allow
16 the attorneys a couple of days, about five
17 days, to Friday at 9 o'clock. That's June
18 17th, to look into that issue.

19 To look into, at the sentencing
20 hearing, and make any arguments that they
21 wish to as to what is the proper sentencing
22 in this case, i.e. life in prison or life
23 without parole.

24 Anything further for the State?

25 MR. RIGDON: No, Your Honor.

1 THE COURT: Anything further for the
2 defense?

3 MR. ROBBINS: No, Your Honor.

4 THE COURT: All right. We'll be
5 adjourned as to this case.

6 Thank y'all very much.

7
8 (Whereupon, at 10:30 a.m. on June
9 13th, 2011 court was adjourned
10 until June 17th, 2011 at 9:00
11 a.m.)

12
13 *****

14
15 Birmingham, Alabama

16 June 17th, 2011 -- 9:25 a.m.

17 (Whereupon, the following was
18 heard in open court with the
19 Defendant and all counsel
20 present.)

21 THE COURT: This is State of Alabama
22 vs. Durrell Bester. CC08-3771.

23 Mr. Bester is here and present with his
24 counsel of record, Attorney John Robbins.

25 The State is also represented by Deputy

1 DA Brady Rigdon.

2 We are here on a continuation from a
3 prior hearing. Which was held on Monday,
4 June 13th, 2011. Today's date is, of
5 course, June 17th, 2011.

6 If memory serves, you all were going to
7 look into the issue of the Defendant's
8 sentence of life without parole. And
9 whether it was based on having a prior Class
10 A felony or was not. Or just on the Court's
11 discretion when one has three[sic] prior
12 felony convictions in the sentence for Class
13 A felony.

14 MR. ROBBINS: That's correct, Your
15 Honor.

16 He had, at the time of sentencing, he
17 had two Class B felonies.

18 THE COURT: Uh-huh.

19 MR. ROBBINS: They were both
20 discharging a firearm into an occupied
21 vehicle.

22 THE COURT: Uh-huh.

23 MR. ROBBINS: And two Class C felonies
24 of unlawful possession of marijuana in the
25 first-degree.

1 THE COURT: Okay.

2 MR. ROBBINS: And all four of those
3 cases were settled. And they were all out
4 of Bessemer. And they were all settled in a
5 package deal which he received a ten year
6 sentence, "cc" on the two Class B felonies.

7 And I'm not sure exactly what it was on
8 the Class C felonies -- But it was all where
9 he actually went to prison and served -- and
10 completed his sentence on the ten years.

11 THE COURT: Okay.

12 MR. ROBBINS: That was his priors.

13 Now, his -- obviously, his current case
14 in which he was sentenced to life without
15 on, is a trafficking case. Which was a
16 Class A felony.

17 And the Court sentenced him under the
18 current state of the law which gives the
19 Court discretion to do either a life
20 sentence or a life without sentence. And
21 this Court, at that time, sentenced him to
22 life without.

23 And we're asking the Court to revisit
24 -- revisit that because of its just extreme
25 nature of it. And we're not asking for you

1 to set aside the conviction. We're asking
2 to simply, is to resentence him to a life
3 sentence.

4 That is still a very harsh, very harsh
5 sentence. He still is going to have to
6 serve many years in prison for his conduct
7 for this particular case. But we're just
8 asking, you know, at some point he has the
9 hope of, you know, the parole board, you
10 know, making a decision to parole him,
11 eventually, at some point in his life. And
12 that's where we left it.

13 The two -- the two unlawful -- the two
14 discharging a firearm into an occupied
15 vehicle in Bessemer, through my discussions
16 with the Deputy District Attorney. He
17 followed up with the DA's Office in
18 Bessemer. And I believe that those two
19 cases started as attempted murders. But
20 were negotiated down to discharging a
21 firearm into an occupied vehicle. And we're
22 simply asking the Court to resentence him to
23 life, within your discretion.

24 I think that that would be appropriate.
25 And it's certainly appropriate if we look at

1 all the other trafficking cases that we
2 unfortunately see through the courts; our
3 courts here, and through federal courts, and
4 through other state courts. That a life
5 without sentence is just extremely harsh.
6 And under the circumstances, I don't think
7 it was warranted in this case.

8 And I ask that the Court to reconsider
9 that.

10 THE COURT: Thank you, John.
11 Brady?

12 MR. RIGDON: Judge, it sounds to me
13 like, the issue before the Court is, the
14 Petitioner's attempt to basically file a
15 motion to reconsider the sentence. Which I
16 believe has to be done within 30 days of the
17 sentence being handed out. And we are well
18 past that. We are two years outside of the
19 sentence being given.

20 We are dealing with a Rule 32 Petition.
21 And the way it's been phrased in the Rule
22 32, with this issue, is whether this Court
23 abused its discretion. And the Rule 32
24 doesn't allow for an abuse of discretion
25 basis. That issue was raised on appeal, as

1 it should have been, and was denied.

2 So now, we're dealing with an abuse of
3 discretion on a sentencing issue. Two years
4 after the sentence was handed out.

5 And Judge, if you'll read the
6 transcript, and we filed that as an Exhibit
7 to our amended motion which was filed
8 yesterday. The Court went through a lengthy
9 hearing process. Five or six witnesses were
10 put forth by the defense to speak on behalf
11 of the Petitioner.

12 The Court expressly found that the
13 Petitioner was a violent offender. In this
14 incidence he was storing a large amount of
15 cocaine at his mother's residence.

16 He hadn't been out of prison very long
17 when this occurred. He had a ten year
18 sentence back in 2001. This happened in 19
19 -- I'm sorry, I think of 2008. We're
20 talking about seven years after the initial
21 sentence was given.

22 And the two priors they were -- ended
23 up being discharging a weapon. But they
24 started out as attempted murder.

25 And the first one there was, in

1 essence, a drive-by shooting. A weapon was
2 fired into a vehicle. Which initially, it
3 contained several people. They got out
4 within seconds of the shots being fired.

5 Three months later, with the same
6 victim, the same type of incident. The guy
7 was actually shot. Shot in the leg. And
8 Mr. Bester was charged with again, attempted
9 murder, and pled down.

10 And the State would again argue that
11 the Court has already made its determination
12 that Mr. Bester is a violent, repeat
13 offender. Because this is his fifth felony.

14 Two of those were extremely violent.
15 Attempted murders. Those were the charges.

16 So again, Judge, we would just ask the
17 Court to deny the Petitioner.

18 MR. ROBBINS: Judge, just briefly.

19 The issue -- I mean, this case is
20 before you on a Rule 32. In which, Mr.
21 Bester did raise issues of -- and it was a
22 pro se petition. Did raise issues of
23 ineffective assistance of counsel, both at
24 the trial court level and on appeal.

25 And also raised the issue challenging

1 his sentence as being extreme. I guess, he
2 didn't put it in the exact line it should
3 have been. Is that he can make a
4 constitutional challenge to the harshness of
5 his sentence under the 5th -- the 8th and
6 14th Amendments of the United States
7 Constitution. And under the corresponding
8 State Constitution challenging the harsh --
9 the cruel and unusual argument.

10 This issue was never taken -- properly
11 taken up and preserved for appellate review.
12 The Court never addressed the sentencing
13 issue because both trial counsel and
14 appellate counsel failed to articulate the
15 issue correctly before this Court. Or to
16 preserve it for appellate review. So the
17 appellate court did not address that issue.

18 THE COURT: Well, doesn't the rules say
19 that if it could have been raised at the
20 trial level or on appeal then it should be
21 deemed denied?

22 MR. ROBBINS: Well, it was --

23 THE COURT: I mean, isn't it like
24 ineffective waiver of raising that issue?

25 MR. ROBBINS: Well, If you don't raise

1 the issue at the trial court level, it could
2 be deemed waived on appeal. But --

3 THE COURT: If it wasn't raised on
4 appeal, it could be deemed waived for
5 purposes of Rule 32.

6 MR. ROBBINS: But they didn't address
7 -- they didn't address the issue. And
8 that's part of a claim of ineffective
9 assistance of counsel.

10 If you did not properly put the issue
11 forward, that could be deemed ineffective by
12 an error in counsel failing to put the
13 proper issue before the Court.

14 And it's a proper sentencing issue of
15 challenging -- simply challenging the
16 Court's imposition of a sentence of life
17 without.

18 THE COURT: Well, let's talk about the
19 sentence, John.

20 Isn't the sentence expressly provided
21 for by the Habitual Offender Act?

22 Isn't it on Exhibit A of the forms that
23 we use all the time here?

24 MR. ROBBINS: But, Judge --

25 THE COURT: I mean, I'm just saying.

1 Doesn't the law --

2 MR. ROBBINS: There's no question --

3 THE COURT: Okay.

4 MR. ROBBINS: -- that the law says that
5 you had two options.

6 THE COURT: Uh-huh.

7 MR. ROBBINS: You had a life or a life
8 without.

9 THE COURT: So you're saying I abused
10 my discretion because it's such a, what?

11 MR. ROBBINS: Judge, it's a -- Yes, I'm
12 saying in this particular instance, I'm
13 respectfully saying that you have abused
14 your discretion.

15 And if you were standing in my shoes,
16 where you have done for many years, you
17 would be making the same argument. Because
18 you have seen -- both as a prosecutor, as a
19 lawyer and as a judge many, many, many
20 extreme cases.

21 THE COURT: Okay. Hold on one second,
22 John.

23 State, address that issue?

24 MR. RIGDON: Issue of abusing
25 discretion --

1 THE COURT: Of that question?

2 No. I mean, this sentence, do you find
3 that it is, you know, disproportionate for
4 the offense committed, considering his
5 priors?

6 MR. RIGDON: Well, Judge, I don't know
7 that I've got an opinion on that. My
8 opinion is that we can't address that issue
9 at this point.

10 If there is no jurisdiction to come
11 back and address a disproportionate sentence
12 two years after a sentence has been handed
13 out.

14 I just don't know that's an issue that
15 can be raised during a Rule 32 Petition
16 based on the arguments raised in the actual
17 petition.

18 THE COURT: Well, assume that it can be
19 raised.

20 MR. RIGDON: Okay.

21 THE COURT: Is it fair to give this man
22 life without parole under the circumstances?

23 MR. RIGDON: Judge, I believe it is.
24 Based on his history.

25 We're talking about two attempted

1 murders.

2 Firing a weapon at a person, one person
3 was actually hit. I don't know how long he
4 served in prison. Five --

5 THE COURT: It was a ten year sentence.
6 I don't know how much of the ten years he
7 served, but. It was a ten year sentence.

8 MR. RIGDON: I think I read in the
9 transcript it was five or six years, maybe.

10 We're talking about serving through
11 about '07. Being out a year, and then
12 trafficking cocaine out of his mother's
13 house. With another weapon.

14 THE COURT: What about the people that
15 commit Capital Murders, and they're found
16 guilty of like felony murder and get a life
17 sentence? Or regular murder or
18 manslaughter, and they do things that are,
19 you know, probably much worse than, you
20 know, trafficking in some drugs?

21 I mean, because you've got somebody
22 that's hurt and dead.

23 MR. RIGDON: Well, Judge, I think the
24 sentence was based primarily on those two
25 attempted murder charges. Where he actually

1 tried to kill someone.

2 THE COURT: Uh-huh.

3 MR. RIGDON: And I don't know that you
4 can compare it to other cases, where a jury
5 may have found another set of facts.

6 But in this case, we know that he tried
7 to kill somebody. Not once, but twice. And
8 on that basis, I mean, the Court had a
9 lengthy hearing. And took in a lot of
10 evidence. And made the determination two
11 years ago, when the information was fresh.
12 That he wasn't -- and Judge, Your Honor
13 said, I find him to be a violent offender.
14 And these are the kinds of acts that are
15 ruining the community. These kind of drug
16 related, violent acts.

17 And based on that, Your Honor sentenced
18 him to life without parole. Based on
19 information two years ago.

20 And I just think it's -- it would be
21 wrong, at this point, to revisit that two
22 years later.

23 THE COURT: All right. Thank you,
24 Brady.

25 (Brief pause.)

1 THE COURT: I've heard enough.

2 (Brief pause.)

3 THE COURT: As previously stated, I
4 recall making comments when he was sentenced
5 in this case. That after hearing the
6 information offered by the State that I felt
7 that he was, and is, a violent offender.

8 And I cannot, one, say that I abused --
9 or the sentencing of him to life without
10 parole was an abuse of my discretion.

11 As a matter of fact, I think it was a
12 very wise use of my discretion. Because I
13 believe that that discretion is given to the
14 Court to allow the Court to protect the
15 public from people such as this Defendant,
16 that have a prior history of violent acts.
17 And then they commit another serious crime,
18 such as a Class A felony.

19 And then, when you look to the facts of
20 the Class A felony. The fact that he was
21 trafficking out of his mother's house. With
22 dangerous -- in a dangerous situation. I
23 think there was a gun found at the house.
24 And you know, I know there were scales and
25 that kind of thing. And baggies, all of

1 those paraphernalia articles found.

2 I think that it was well within the
3 Court's discretion to adjudge him to be a
4 violent offender, and to sentence him to
5 life without parole under the Habitual
6 Offender Act.

7 The Court did have some trepidation in
8 thinking about this sentence. And comparing
9 it to other sentences that the Court has
10 seen over the last 30 years, 31 years.
11 Where there have, in my mind, been some
12 injustices where people who have committed
13 horrendous acts have unfortunately (pause)
14 gotten off, I guess, with lesser sentences
15 than what they actually deserved based upon
16 what I believe their behavior to be.

17 But, those are jury decisions. And
18 they're not decisions left up to the Court.
19 So I have to respect those jury decisions.

20 Additionally, the Court does not
21 believe that at this late date it has
22 jurisdiction to amend his sentence from life
23 without parole to life. Based upon the time
24 that has past since the original sentence.

25 Therefore, it's the judgment of the

1 Court that this ground is denied. And the
2 Defendant is not entitled to relief pursuant
3 to Rule 32.

4 Thank y'all.

5 MR. RIGDON: Thank you, Judge.

6 (Whereupon, the following
7 proceedings were adjourned at 9:45
8 a.m. on June 17th, 2011.)

9
10 *** END OF PROCEEDINGS ***

1 CERTIFICATE OF COMPLETION OF
2 REPORTER'S TRANSCRIPT

3
4 IN RE:

5
6 DURRELL BESTER VS. STATE OF ALABAMA
7 CC2008-3771.60 & CC2008-3772.60

8 *****
9

10 I, Alicia Martin, Official Reporter for the
11 Tenth Judicial Circuit of Alabama and Notary
12 Public, State of Alabama at Large, do hereby
13 certify there came before me the aforementioned
14 proceedings, including witnesses who were duly
15 sworn to testify to the truth concerning the
16 matters in this cause, said evidence being taken
17 down stenographically by me and transcribed by me
18 or under my supervision and control.

19 All the pages of the transcript are
20 numbered serially at the right-hand corner of each
21 page, prefaced by the reporter's index, followed
22 by the transcript, and ending with the numbers
23 appearing on this certificate.

24 I further certify that I am neither
25 attorney or counsel for, nor related to, or

1 employed by any of the parties to the action in
2 which this proceeding is taken; and furthermore,
3 that I am not a relative or employee of any
4 attorney or counsel employed by the parties hereto
5 or financially interested in the action.

6 IN WITNESS THEREOF, I have set my hand and
7 affixed my Notarial seal this the 27th day of
8 January, 2012.

9
10
11
12
13
14
15
16
17
18 S/ Alicia Martin

19 Alicia Martin, Official Court Reporter

20 ACCR# 215
21
22
23
24
25

CERTIFICATE OF COMPLETION
REPORTER'S TRANSCRIPT

Criminal Appeals Case Number: CR11-0207

DURRELL BESTER,
Appellant

Vs. Trial Court Case No: CC2008-3771.60 &
CC2008-3772.60

STATE OF ALABAMA,
Appellee.

Notice of Appeal Date: July 13th, 2011

I, Alicia Martin, certify that I have this date completed and filed with the clerk of the trial court an original copy and an electronic file of a true and correct transcript of all proceedings in the above referenced case that were reported by me and were specifically designated by the appellant for inclusion on the Reporter's Transcript Order. The transcript, which is numbered serially in the upper right-hand corner of each page, begins with a copy of the Reporter's Transcript Order and an index of both the exhibits and the testimony of the witnesses. The original transcript concludes with the original of this notice and the electronic file of the transcript conclude with copies of this notice. The page number appearing in the upper right-hand corner of this certificate is the last page of my portion of the transcript in this case. Done this 27th day of January, 2012.

S/Alicia Martin
Official Court Reporter
ACCR# 215

State of Alabama Unified Judicial System From ARAP - 14 Rev. 11 / 91	CERTIFICATE OF COMPLETION AND TRANSMITTAL OF RECORD ON APPEAL BY TRIAL CLERK	Appellate Case Number CR-2011-0207
TO: THE CLERK OF THE COURT OF CRIMINAL APPEALS OF ALABAMA		DATE OF NOTICE OF APPEAL: 07/13/2011
APPELLANT DURRELL BESTER		
v. STATE OF ALABAMA		
<p>I certify that I have this date completed and transmitted herewith to the appellate court the record on appeal by assembling in (a single volume of <u>175</u> pages) (_____ volumes of 200 pages each and one volume of _____ pages) the clerk's record and the reporter's transcript and that one copy each of the record on appeal has been served on the defendant and the Attorney General of the State of Alabama for the preparation of brief.</p>		
<p>I certify that a copy of this certificate has this date been served on counsel for each party to the appeal.</p>		
<p>DATED this <u>14TH</u> day of <u>FEBRUARY</u>, <u>2012</u>.</p>		
<p style="text-align: right;">s/ANNE-MARIE ADAMS</p> <p style="text-align: center;">Circuit Clerk</p>		

INDEX

APPEAL JACKET	1
CASE ACTION SUMMARY(CC-2008-3771.60)	2
NOTICE OF APPEAL(CC-2008-3771.60)	18
PETITION FOR RELIEF FROM CONVICTION OR SENTENCE	21
IN FORMA PAUPERIS DECLARATION	45
MOTION TO DISMISS RULE 32 PETITION	48
NOTICE OF APPEARANCE	74
AFFIDAVIT	75
INDEX OF EXHIBITS	77
COURT'S EXHIBIT 1-EXCERPT TRIAL RECORD	78
PETITIONER'S EXHIBIT 1-CAS/ DEFT'S PRIOR	80
PETITIONER'S EXHIBIT 2- CAS/DEFT'S PRIOR	81
PETITIONER'S EXHIBIT 3-CAS/DEFT'S PRIOR	82
PETITIONER'S EXHIBIT 4-CAS/DEFT'S PRIOR	83
DOCKETING STATEMENT	84
REPORTER'S TRANSCRIPT ORDER	86